CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

MONROE.

JUNE, 1879.

JUDGES OF THE COURT:

HON. T. C. MANNING, *Chief Justice.*

HON. R. H. MARR,
HON. A. DEBLANC,
HON. W. B. SPENCER,
HON. E. D. WHITE,
Associate Justices.

No. 913.

WM. S. MCINTOSH, TUTOR, VS. R. H. KELLY ET AL.

An agent employed by the tutor of a minor to manage a plantation of the minor, and employ laborers for its cultivation, is not authorized to form a planting partnership with one of such laborers.

Where no valid contract has been made by the tutor for supplies furnished for the cultivation of the minor's plantation, the minor is liable for only so much of the supplies as are proved to have inured to his benefit.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Parsons*, J.

Richardson & McEnery for defendants and appellants.

Cobb & Gunby for plaintiff and appellee.

The opinion of the court was delivered by

SPENCER, J. The minor Helen S. Stafford owned the Cherry Bluff plantation in Richland parish. Her tutor and father was J. Q. C. Stafford, who during the year 1875 undertook the cultivation of said place, in the name and for account of the minor. He appointed one Hunter as agent or manager of the place. As such Hunter employed laborers,

and made contracts with them. The general terms of these contracts were, that Stafford, tutor, should furnish land, houses, team and utensils, and advance necessary supplies. The laborer to have one half the crops, less such amount thereof as would reimburse the supplies advanced. Among the persons employed by Hunter, agent, was one J. M. Calloway. The substance of their contract was, that Calloway was "to furnish his horse, two oxen, and wagon and his personal labor in overseeing and cultivating the plantation, and to cultivate ——— acres in cotton and ——— acres in corn. Hunter, agent, was to furnish the land and two mules free of rent for the year 1875; Calloway to occupy the house and quarters on said place and to keep the same in good order, and superintend the building of the fence, and look to the care of stock; Calloway to receive one half of the crop of cotton and corn made by him on the said ——— acres of land, as also one half of the net share of crop made by the other laborers on said place, less the amount of supplies furnished him by said Hunter, agent."

R. H. Kelly was a merchant at Girard, in said parish. During the year Calloway, who was a nephew of Kelly by marriage, purchased goods, wares, and merchandise from Kelly. The credit seems to have been extended solely to Calloway. He bought the goods. The account was kept against him alone. It amounted to about $690, and embraced every variety of article of family use, from candy to pickled pork—from tape, needles, and pins to osnabergs and cottonades.

In January, 1867, Kelly, alleging that Calloway and Stafford were planting partners, and that he had furnished them with necessary supplies to make the crop of 1875 on Cherry Bluff, sequestered all the cotton and corn on the place, and caused the same to be delivered to him on bond, and disposed of it.

The present suit is brought by McIntosh, tutor of said minor (the former tutor having died), against Kelly and the sheriff to recover said property or its value. There was judgment below condemning defendants to return the property, and in default thereof to pay its value, $760, less $297 83, the amount of necessary supplies furnished by Kelly to make the crop; also for $100 damages for attorney's fees, etc. Kelly having died, his administrator, John Chaffe, appeals. The sheriff has not appealed. There was no partnership between Stafford, and Calloway, much less between the latter and the minor. Hunter himself was but a manager or overseer, and had no authority in law or fact to put either Stafford or the minor in partnership with any one.

Calloway is shown to have utterly failed to perform his part of the contract, and to have been a very idle person—neither working himself nor inducing the other laborers to work and gather the crops.

Under the testimony in this case Calloway himself could not have

justly demanded any part of the products of the year. If Kelly had any rights against the minor, it was only to the extent that he shows that the goods and supplies furnished by him to Calloway were used in feeding the laborers, etc., whilst making the crop, and to the extent therefore that they inured to the benefit of the minor. The judge *a quo* had the witnesses before him, and he concluded that the minor had received benefit to the extent of $297 83. The minor, under the evidence in this case was the owner of the crop, and had advanced to the negroes supplies quite equal to their portion of it. The seizure of it by Kelly, as the property of a planting partnership, between Stafford and Calloway, was tortious; and as he disposed of it, he was properly condemned to pay its value, and damages. We are not prepared to say the judge *a quo* erred in allowing the credit of $297 83, as being the amount of advantage derived by the minor, from the supplies furnished by Kelly to Calloway.

The judgment is therefore affirmed with costs.

No. 939.

THE STATE VS. WARREN ROBACKER.

An information which is "ordered" to be filed by the court, is presumed to be filed "with the consent of the court first obtained."

Where it appears that a defendant charged with larceny was represented by counsel when his case was fixed for trial, it is no ground for an arrest of the judgment in his case that he was neither present when the case was fixed, nor consented to its being fixed.

It is no ground of just complaint that the accused was not present at the beginning of his trial, when it appears that he was present in court when his "trial was proceeded with."

The want of an averment, in an information filed by a district attorney *pro tem.*, that the district attorney was absent, disabled, recused, or refused to act, is a defect which must be objected to by demurrer, or motion to quash, before trial. It cannot be availed of in arrest of judgment.

The charge in an information that certain property was stolen in a certain parish, sufficiently sets forth the locality of the property, at the date of its theft.

APPEAL from the Parish Court of Madison. *Dennis*, J.

George J. Bradford, District Attorney *pro tem.*, for the State.

Stone & Slack for defendant.

The opinion of the court was delivered by

SPENCER, J. The defendant was tried and convicted of the crime of larceny, on information filed by the district attorney *pro tem.* of Madison

parish, in the parish court of that parish. The trial was had before that court.

The case is presented to us by an assignment of errors apparent on the face of the record, which we will consider in their order.

First—That the information was not filed "with consent of the court first obtained." The record shows that the court "ordered the information to be filed." Courts are supposed to consent to that which they order.

Second—The accused was denied the constitutional right of trial. It does not appear that he applied for trial, and if he had, its denial would not affect the legality of his trial. But there is not the slightest foundation in the record for this charge.

Third and fifth—The case was, on the 8th of April, set for trial on the 10th, without consent or presence of the accused. The record shows that the court on the 8th appointed Mr. Slack, an attorney, to represent the accused, and fixed the case for the 10th. The accused was therefore represented by counsel present, and this presence sufficed so far as fixing the case was concerned. If a case could not be fixed for trial without the consent of accused, few criminals would be tried. Besides, his presence on this occasion was not necessary. State vs. Outs, 30 A. 1155. If he was not ready for trial, he should have asked delay when brought to the bar for trial, and excepted if delay was denied. It is no ground in arrest.

Fourth—"The accused was not present in court at or during the opening and beginning of the trial, for the case was *proceeded with* on the 10th, showing that a trial *was begun* previous to that date."

The case on the 8th had been fixed for the 10th. The minutes of the 10th show that on that day "the accused was brought into court and trial proceeded with," etc. This objection is a play upon words.

Fifth—That the court erred in overruling certain grounds filed by way of motion in arrest of judgment. These are, that the district attorney *pro tem.* has no right or power to prosecute or file informations except in the absence of the district attorney or in case of his disability, refusal or recusation. That it does not appear that the district attorney was absent, recused, etc. That it should have been averred in the information that he was absent or recused, etc. That the information is not according to and in conformity with the common law of England. That the locality of the property at the time of its theft is not sufficiently stated, etc.

If we were to concede the proposition that the absence, recusation, etc., of the district attorney must be averred in informations, the want of such averment would be a "formal defect apparent on the face there-

of." Objection to which must "be taken by demurrer or motion to quash" before trial, "and not afterwards." R. S. sec. 1064.

We are not advised in what respect the information wants conformity to the common law, when divested of "unnecessary prolixity."

The charge is that the accused *did* (on a day named), *in the parish of Madison*, and within the jurisdiction, etc., feloniously steal, take and carry away, etc. If he did the stealing in Madison parish, the thing stolen must have been in that parish when stolen.

The judgment appealed from is affirmed.

No. 936.

ADELINE SPIVEY VS. WM. WILSON.

It is not necessary that the judge should have authorized a wife to sue for a separation of property in a case where the husband in proper person accepted service of the wife's petition, and made no objection.

The prescription which has for its object the acquisition of property, can only be invoked by one who has had possession as owner, not by one who has been in possession under a mere simulation of ownership.

Where the seller remains in possession of the thing sold, the sale is presumed to be simulated, and in the absence of proof to the contrary, will be held to be simulated.

The wife who is separated in property from her husband cannot acquire property with his money, to the prejudice of his creditors.

APPEAL from the Eleventh Judicial District Court, parish of Lincoln. *Graham*, J.

John Young for plaintiff and appellee.

Allen Barksdale for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. The plaintiff brings this her third opposition to the sale of 640 acres of land and one bale of cotton, seized as the property of her husband, Moses Spivey, to satisfy a judgment in the suit of A. C. Hill vs. Moses Spivey.

She claims to be owner by conveyance from C. W. Hodge, of date 6th May, 1868. She alleges that Hodge acquired at succession sale, 18th May, 1867, of the estate of J. B. Mitchell, per deed of date 6th September, 1867; that Mitchell acquired by purchase from Moses Spivey, her husband, by deed of date 13th March, 1866, and duly recorded on 17th of same month and year.

She further alleges that she was duly separated in property from her husband, and the community between them dissolved, by decree of date May 29, 1867. She alleges that the property has been seized at the

instance of William Wilson, and that she has been damaged to a stated amount by the illegal proceedings. She therefore opposes the sale, demands its nullity if made, and prays for damages.

The answer admits the seizure, but avers that the property is that of the husband, Moses Spivey, and that plaintiff's judgment and separation is fraudulent and simulated. That the sales from Moses Spivey to J. B. Mitchell, from J. B. Mitchell's administrator, Rainey, to C. W. Hodge, and from Hodge to plaintiff, are and were each and all fraudulent simulations, concocted and devised to defraud the creditors of Moses Spivey, an insolvent. That Moses Spivey remained, during all these pretended mutations of title, in the actual undisturbed and open possession of the said property, and that he never received any consideration for its pretended sale. That the conveyance by Hodge of said property to Mrs. Spivey was a sham; that she was merely a person interposed, and that Moses Spivey was the real owner. This suit or opposition was filed February 25, 1878, and defendant's answer May 18, 1878.

Plaintiff subsequently filed several pleas of prescription—that of one year against the demand in nullity of her judgment; that of five years as to the succession of J. B. Mitchell; that of five years to the note sued upon in the case of Hill vs. Spivey, and that of ten years as to her ownership and title to the property.

We may here eliminate from this case all question as to the validity of plaintiff's separation from her husband. We are satisfied that her demands for separation against him were well founded, and that the judgment was properly rendered, advertised and executed. The objection that she was not authorized by the judge to bring the suit has no force in it, as the husband in proper person accepted service of the petition and made no objection. The real and only question in this case is, were the sales and transfers from Spivey, through Mitchell and Hodge to Mrs. Spivey, simulations devised and intended to defraud creditors. If they were, the questions of prescription raised by plaintiff are immaterial, since prescription *acquirendi causa* can be invoked only by one who possesses as owner. The judgment of Hill vs. Spivey was rendered on a note dated in 1859 or 1860, and after contest. The judgment was dated 23d March, 1870. It was therefore a debt of Spivey existing antecedently to these alleged sales, and the judgment is *res adjudicata* against him. If therefore Mrs. Spivey is not the owner, but simply the *alter ego* of her husband—a person interposed to hold the property for him, there is no occasion to determine the questions as to whether the note upon which that judgment was predicated was or not at the time prescribed, nor whether a third possessor can or not plead such prescription after judgment.

The evidence in this record shows that Moses Spivey was much involved; that he made propositions to Gibson, who then held the note sued upon in the Hi'l vs. Spivey case, to settle it in part, if he Gibson would assist by means of it, to cover Spivey's property; that Mitchell stated that Spivey had desired to effect a similar arrangement with him. Then comes the deed from Spivey to Mitchell, conveying 1160 acres of land with several horses, cows, sewing machine, hogs, etc., at the price of $2000 cash. It seems that Mitchell did execute a draft to Spivey on Standifer & Co., Trenton, for the $2000, which was so far as appears never presented. Spivey continued in possession of every thing sold, Mitchell exercising no control whatever. Mitchell died and Rainey was appointed his administrator. The lands in question were put on the inventory: but it was therein stated that the movables were in Spivey's possession, and had not come into Mitchell's hands. The lands were sold by the administrator of Mitchell on 18th May, 1867, and adjudicated to C. W. Hodge (1160 acres) for $1740 cash. As we have seen, Hodge subsequently conveyed to Mrs. Spivey, the plaintiff, for $2000 cash.

The plaintiff herself went on the stand as a witness for herself. She says she had no money in 1867, at the time she was separated from her husband. She was unable to state any sources from which she obtained money in 1867 or 1868; admits that no delivery was ever made of any of the property sold to Mitchell; that it remained in the hands of Spivey; admits that Hodge bought the land in for her; and that Mr. Spivey paid the price to the estate of Mitchell, and thinks he did so with the money proceeding from the Mitchell draft in favor of Spivey. In other words the adjudication to Hodge was paid for by Spivey, through the draft given him originally by Mitchell.

The law declares that where the seller remains in possession of the thing sold, the sale is presumed to be simulated. We have no doubt of the simulation of the sale by Spivey to Mitchell. Mitchell's death embarrassed the transaction somewhat, and necessitated an adjudication to Hodge. The effect and result of these transactions were to put the property of Spivey in the name of his wife. Such a disguise cannot protect it from his creditors. The wife separate in property from her husband may acquire property in her own name; but she cannot do so with her husband's money to the prejudice of his creditors.

As regards the question of Wilson's ownership of the judgment of Hill vs. Spivey, it is only necessary to say that plaintiff raises no such question in her opposition; and that the execution in that case issued for the use and "benefit of Wm. Wilson." As the records of the suit were burned with the court house of Jackson parish in 1878, it is fair to presume there was authority therein for the clerk so issuing it. Besides,

as we hold that plaintiff is not owner of the property seized, she has no interest in raising the question.

The judgment below was in favor of plaintiff, and is erroneous. It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now decreed that there be judgment for defendant, rejecting plaintiff's demands, at her costs, in both courts.

No. 941.

J. W. GREEN, RECEIVER, ETC., VS. J. W. LOCKE ET AL.

Where application for a jury is made at one term of the court, and overruled by the court, and properly overruled, because the party who made the application did not comply with the order of court to make the deposit for jury fees on the day of the application, the deposit of the jury fees before the trial of the case at a subsequent term of the court, without there having been a new application for a jury, will not entitle the party to a jury.

Where an *employee*, who has been engaged to perform the duties of a certain office, which he holds at the pleasure of his employer, and who has given bond and surety for the faithful discharge of the work and duties of said office, is transferred by the employer to another parish, and there put by the employer to doing entirely different work, at a different salary, for two months, and during that time, with the consent and aid of the employer, obtains and holds the place of mail agent of the United States, the term of his original office thereby ends, and his surety is liable for no loss caused by his subsequent misconduct, in said office, to which he is a second time called by his employer.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons*, J.

Richardson & McEnery for plaintiff and appellee.

Cobb & Gunby for defendants and appellants.

The opinion of the court was delivered by

SPENCER, J. The plaintiff on 5th May, 1875, employed Locke as station and ticket agent of said company at Monroe, La. To secure his employer, Locke on that day executed his bond for $2500 *in solido* with W. H. H. Mullin and R. G. Cobb as his sureties. The bond recites that "the condition of its obligation is such, that whereas the said Joseph W. Locke has been appointed by said John W. Green, receiver, to the position of station and ticket agent for the receivership, at Monroe, during the pleasure of said receiver.

"Now therefore if the said Locke shall well and truly discharge and perform all the duties incumbent on him in his said capacity of station and ticket agent for the receiver, and shall render a true and faithful account of all freights which may be delivered at his station, whether

for shipment or for delivery, and also of all moneys, bills, etc., belonging to said receivership, which may come into his hands or be due and payable at his station, according to the instructions and orders of the said receiver, then this obligation is to be null and void, otherwise to be and remain in full force and virtue."

Locke entered upon the discharge of his duties soon after at $100 per month, and continued therein up to 12th April, 1876. From that date to the 17th June, 1876, he was employed by the receiver at sixty dollars per month, to conduct a line of skiffs for the railroad, carrying the United States mails between Delhi and Bœuf river, in Richland parish. This was in consequence of the overflow of the railroad by the floods of that year. During these two months his salary as station and ticket agent at Monroe was by notice from the receiver discontinued, and Locke devoted his whole time to the superintendence of the skiff line. Through assistance and solicitation of Green, the receiver, he was also appointed by the United States postoffice department, as route agent, on the line from Delhi to Bœuf river; was duly sworn and qualified as such, and received a salary as such from the United States government during said two months. On 17th June, 1876, after cessation of overflow, Locke returned to Monroe and resumed charge and control of the freight and ticket office at Monroe, and continued therein up to 7th January, 1878. Of the receipts at said office, for the month of December, 1877, and up to 4th January, 1878, Locke failed to pay over the sum of $2045 30. The present suit is brought against him and his sureties *in solido* to recover that amount.

Locke's answer is in substance a general denial—admitting however his liability for about $800. He avers that the balance of the deficit, $1200, is not chargeable to him, for the reason that on 23d December, 1877, he was ordered by the agent of the receiver to leave his office and duties as station and ticket agent at Monroe, and take charge of a train and act as conductor, for four or five days, and that another person, R. W. Jamison, was placed in charge of his office and business during this time; and that the said deficit of $1200 resulted from the mismanagement of Jamison, who failed to pay over and account for that sum, received during his occupancy of that office. That Jamison's shortcomings cannot be charged to or recovered from respondent.

There is no disputing the fact that there was a defalcation of $2045 30 at the Monroe office. The testimony of Green, the receiver, and of McGuire and Milling, satisfies us that Jamison did pay over and account for his receipts. Locke's own weekly and monthly statements fix his liability to the company. The evidence is voluminous, and it would be impracticable, within the compass of an opinion, to review it at length. Suffice it to say that it satisfied the court below and satisfies us that Locke owes the amount claimed of him.

But it is urged in behalf of defendant that the court erred in overruling his application for trial by jury. It is not disputed that the case was one properly triable by jury, but the question is whether the defendant complied with the requirements of the law in his application. The act No. 44 of 1877, sec. 9, requires that before a jury shall be ordered in any civil case, the party applying for it shall deposit with the clerk a jury fee of $12. The defendant's answer, containing the prayer for jury was filed on 29th April, 1878, during the motion hour—the counsel announcing at the time that the fee had not been paid, and that he desired no action on the prayer for jury until the deposit was made. The plaintiff moved the court that the defendant be ordered to make said deposit by 3 p. m. of that day, and on his failure so to do, that his application for jury be refused. The court so ordered, and defendant having failed, his application was overruled. Defendant excepted, on the ground that he had time until the case was reached in its order and fixed for trial, and that until then the court could render no order in the matter.

We think the rule contended for by defendant would be impracticable in the country parishes, and would often operate either an indefinite continuance of a case, or necessitate the indefinite retention of the jury. Under the rules of the court for Ouachita, the first week is devoted to civil cases, preference being given to jury cases. The second week is devoted to the criminal docket. The substance of defendant's proposition is that he can pray for a jury, and withhold the deposit until the case is reached on the docket for trial, then make his deposit, and demand the jury. That the court is bound therefore to keep the jury in attendance to see if the party will be entitled to it. The case was not reached at the April term; and some weeks after the defendant made the deposit. At the next term, January, 1879, when the case was called for trial, the defendant exhibited the clerk's receipt. The court refused to order a jury, on the ground that it was too late, and that the application had already been overruled. We think that the application was not too late, had it been made *de novo* and in due form. The first application had been overruled, and until renewed there was none before the court. The fact that the court had at the previous term overruled an application because no deposit had been made, did not preclude another application, at a subsequent term, when the case was first called and fixed for trial, and the deposit had been made.

The sureties have interposed various defences, of which it will be necessary to notice but one. They contend that on the 12th of April, 1876, when the receiver notified Locke that his salary as station and ticket agent was suspended, and when he employed him at a different salary, to do different work in another parish, and assisted him in obtaining an appointment as a United States mail agent, that Locke's

employment for which they were sureties, then terminated; and that his resumption of duty, two months later, as station and ticket agent at Monroe, must be considered as another and distinct employment, for which they are not bound. We have seen that Locke's employment was temporary and precarious, being *at the pleasure of the receiver.* That the receiver, in the exercise of this absolute discretion and power, notified Locke that, as his services were no longer needed as station agent, in consequence of the overflow, his salary would be suspended. That he then employed Locke at a salary of $60 per month, to run a line of skiffs in Richland parish. That Locke in pursuance of this new employment, spent two months time in said new business; and by consent and assistance of Green obtained the position of route agent. By the 20th section of the official instructions of the postoffice department to employees of the railway mail service, as well as by the 787th section of the Postal Regulations, route agents are prohibited while on duty as such from "engagement at any time, in any occupation of profit or emolument," and are enjoined to "confine themselves wholly to the duties imposed upon them by the department." "The time while off actual duty is for rest and study." For the performance of these duties Locke took an oath of office. He accepted and undertook them with Green's assent. That employment was wholly inconsistent with his being the servant of the railroad, and his acceptance thereof was necessarily a termination of his employment as such. The transaction implied on his part, as well as on that of Green, an end of his previous engagement. There is no principle of law by which the obligation of the sureties in this case can be extended to any subsequent services rendered by Locke, as station agent at Monroe. Whether those services were rendered by him, by tacit or express agreement, at the same rates as before or not, is immaterial. It was another engagement. The obligation of the first had terminated, and the sureties never assented to its renewal.

"Suretyship cannot be presumed; it ought to be expressed, and is to be restrained within the limits intended by the contract." Civil Code 3039.

It cannot be presumed that because a person is willing at one time to guarantee the honesty of another, that he intends to enter into a continuing guarantee of his fidelity for all time, and as often as the person employing him may see fit to engage him. The obligation of the surety is voluntary on his part, without profit or advantage. Courts uniformly construe his obligations strictly, and refuse to extend them by implication, or construction. See McGuire vs. Wooldridge, 6 R. 50; Miller vs. Stewart, 9 Wheat. 680; Fasnacht vs. Winkelman, 21 A. 727;

Gersen vs. Hamilton, 30 A. 737; Troplong du Cautionment, p. 143, No. 155.

It is therefore ordered and decreed that the judgment appealed from is reversed and set aside as to the sureties Mullin and Cobb, and as to them plaintiff's demand is rejected. It is further ordered and decreed that as to defendant Locke, said judgment is affirmed with costs.

CONCURRING OPINION.

MARR, J. The defendant waived his right to a trial by jury by his failure to demand it before the jury had been discharged.

The right to trial by jury is not dependent upon the discretion of the judge; but the law requires that it shall be specially prayed for, and that the jury fee be paid. When the jury fee is not paid at the time the prayer for jury trial is filed, the court, of course, will disregard it, and proceed without jury if the fee be not paid before the case is fixed for trial, or, where there is no special fixing, before it is reached in due course. If before the fee is paid, the jury be discharged, the granting of a trial by jury would simply operate a continuance for the term merely because of the laches of the party appealing for it, and his failure to comply with the requirement of the law.

Ordinarily, when the prayer for trial by jury is filed, and the jury fee is paid, it is the business of the clerk to mark it on the docket as a case to be tried by jury. But in this case, the application for trial by jury had been passed upon by the court, and overruled. Right or wrong, this ruling was obligatory on the clerk; and he could not, while that order remained unrevoked, disregard it, and treat the case as one to be tried by jury.

At the ensuing term there was no application for trial by jury before the court. It was the business of defendant, if he still desired to avail himself of the right to trial by jury, to have renewed his application. The right was perfect; and if the application had been made before the jury was discharged, it could not, legally, have been refused by the court, as the jury fee had already been deposited with the clerk. The defendant did not do this. He waited until after the jury had been discharged, and it was no longer possible for him to have a trial by jury at that term, without putting the parish to the expense of a new jury, called for that case alone. The application, therefore, came too late; and the court did not err in trying the case without jury.

I concur in the conclusions and decree of the court.

No. 901.

Renshaw, Cammack & Co. vs. Imboden et al.

Records of other suits, made part of, and filed with the petition of appeal, are not part of the evidence, and will not be considered on appeal.

Property sold for taxes must have been previously advertised three times within ten days in the official journal, or where such publications cannot be made, *public notice* for ten days must have been given of the sale. A sale made before the lapse of ten clear days from the first notice, or publication, is fatally defective.

The tax sale of property to the highest bidder for a price less than the amount of the accrued State taxes, with the penalties, costs, charges, and expenses included, is an absolute nullity; and a transfer under such sale may be disregarded by any creditor of the owner of the property.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Parsons*, J.

W. W. Farmer and *Cobb & Gunby* for defendant and appellant.

Wells & Williams for plaintiffs and appellees.

The opinion of the court was delivered by

Marr, J. Under an execution on a judgment in favor of Imboden, against Mrs. Amanda L. Miller, the sheriff seized and was about to sell certain real property in Richland parish. Renshaw, Cammack & Co., claiming to be the owners of the property, under a conveyance from Montgomery, who purchased at a tax collector's sale, brought this suit to enjoin further proceedings by the sheriff.

Judgment was taken by default, and confirmed, declaring Renshaw, Cammack & Co. to be the true and legal owners of the property: and perpetuating the injunction. Imboden appealed.

The proof of title on which the default was confirmed consisted of the tax collector's deed, and the Auditor's confirmative deed, to Montgomery; and the conveyance by Montgomery to Renshaw, Cammack & Co. Part of the property described in these conveyances, the *west* half of the southwest quarter of section six, is not the *north* half of the same quarter, seized by the sheriff under Imboden's suit; but there are two fatal defects, disclosed in the tax collector's deed, which make it unnecessary for us to pass upon the other matters set up by appellant. We deem it proper to say, however, that the records and proceedings in two other suits, made part of and filed with the petition of appeal, are no part of the evidence in the cause; and they cannot be considered for any purpose on this appeal.

The collector states, in his deed, that he proceeded under Act No. 47, of 1873: that he made the necessary publications in the Richland Beacon on the 29th November, and sold the property on the 9th December: that the seizure was made for the payment of taxes due by B. R. Miller, for the years 1873, 1874, 1875, amounting, with penalties, costs

and charges, to $97 86; and that he adjudicated the property to Montgomery, the last and highest bidder, for the sum and price of $36 35.

First. Section one of the act 47, of 1873, requires the tax collectors to sell "after advertising three times, within ten days, in the official journal, and in the country parishes where such publications cannot be made by public notice *for such ten days.*" We interpret this to mean that whether the notice be by publication, or by posting, there must be ten clear days between the first appearance of the notice and the sale; and, as the deed makes no reference to any other publication than that made in the Beacon on the 29th November, the sale could not have been lawfully made before the 10th of December.

Second. Section nine of the act provides that if the highest bid for the property offered for sale, for non-payment of the taxes, should be insufficient to pay the taxes proceeded for, and the penalties, and costs, charges and expenses, such bid shall be rejected. In such case, the collector may bid in the property for the State; but he cannot adjudicate it to a bidder for anything less than the amount due the State for taxes, with the penalties, and the costs, charges and expenses. The deed shows that the price of the adjudication to Montgomery was less than half the amount required. The sale was an absolute nullity; and Montgomery acquired no title, and could not convey title to his vendees. Renshaw, Cammack & Co.

We are not to be understood as questioning the correctness of our decisions in Lannes vs. Workingmen's Bank, 29 An. 112, and Jurey & Gillis vs. Allison, 30 An. 1234. In Lannes' case, the bank, a mortgage creditor of Blaize Lannes, seized the mortgaged property under executory process. Pierre Lannes enjoined, alleging that he was the owner of the property, under the deeds of the tax collector and the Auditor. The bank answered that the collector had no authority to give the title; that the property when sold did not belong to the person in whose name it was assessed; and that the collector's deed was, therefore, void, There was no apparent nullity or defect in the deed itself; and we held that the mortgage creditor could not ignore the apparently valid tax title, and seize the property as if no such title existed; and that he must proceed by direct revocatory action.

In the case of Jurey & Gillis, a judgment creditor seized the land under execution; and Jurey & Gillis enjoined, claiming title under the deeds of the tax collector and the Auditor. The seizing creditor relied upon causes of nullity not apparent in the deeds, irregularities on the part of the officer making the sale. We held that, as the constitution, art. 118, makes the tax collector's deed *prima facie* evidence of a valid sale, it must be presumed to be valid until it is annulled in a direct revocatory action.

The present case differs in that the deed itself discloses, on its face, the absolute nullity of the sale. Where the alleged nullity of the tax deed depends upon proof *dehors* the instrument, it must be received and treated as evidence of a valid sale, until the contrary is shown; but where, as in this case, the deed contains all the evidence of its nullity, it is not necessary to attack it, by suit, or to have the nullity declared judicially.

The judgment appealed from is therefore annulled, avoided and reversed; and it is now ordered, adjudged and decreed that the injunction herein granted be dissolved; that the demand of plaintiffs, Renshaw, Cammack & Co., be rejected, and their suit and petition be dismissed; and that they pay the costs in this court and in the district court.

No. 903.

THE STATE vs. J. P. BOTT.

A State law authorizing the police juries of the parishes to prohibit the sale of intoxicating liquors on Sunday, does not violate that clause of the constitution of the United States which forbids the enactment of laws impairing the obligations of contracts. Nor does it violate article 110 of the constitution of this State, which forbids the divesture of vested rights, etc.

An ordinance of a police jury forbidding the sale of liquors on Sunday has not for its object the enforcement of the observance of the Christian Sabbath, but is a mere police regulation, under the police power of the State for the preservation of public order; and hence is not obnoxious to any provision of the constitution of the State, or of the United States, respecting religion. Nor is such a regulation violative of the general law, or "law of the land."

The title of the act known as the "Sunday law," passed by the General Assembly of 1878 (Sess. Acts, p. 135) sufficiently indicates the object of the law.

The power to regulate and prohibit the sale of liquors, conferred by the Act of 1878 on the police juries, extends to all incorporated towns and villages, and no town will be allowed to claim exemption from the operation of the act, by assuming the designation of "city."

APPEAL from the Parish Court of East Baton Rouge. *Newton*, J.

W. N. Potts, District Attorney, for the State, appellee.

Herron, Bird & Beale for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. The defendant is prosecuted for openly and publicly selling intoxicating liquors on Sunday, and on conviction was fined fifty dollars. It is the first appealed prosecution under what is known as the "Sunday law." The General Assembly in 1878, Sess. Acts p. 135, delegated to the police juries full and plenary authority to make such regulations as they may deem proper in regard to the sale, barter, or

exchange of intoxicating liquors or merchandize on Sunday, and to totally prohibit the same on Sunday, if in their judgment necessary. Violations of the jury ordinances, made under this Act, are to be considered misdemeanors, and the penalties are to be enforced by indictment and information, and the power thus conferred upon these juries is to extend over and apply to all incorporated towns and villages within the limits of the respective parishes.

The defendant moved to quash the information on several grounds;

1. The Act of 1878 violates section 10 of article 2 of the constitution of the United States in this, that the defendant had paid for a license for carrying on his business during the whole of the present year, and the police jury's ordinance prohibiting it on Sunday violated a contract.

2. That it violates art. 110 of our State constitution in that it impairs the obligation of a contract, and divests vested rights, for no purpose of public utility, and without adequate compensation.

3. That it violates art. 12 of the constitution, in that it is not intended as a police or sanitary regulation, but to enforce the observance of the Christian sabbath.

4. That it is in violation of "the law of the land," is without public utility, and unwarrantably, unnecessarily, and arbitrarily restricts defendant in the use of his capital and the pursuit of his lawful and licensed business.

5. That the objects of the law are not expressed in its title, in this that the title does not indicate that violations of the jury ordinance are made misdemeanors, punishable by indictment or information.

6. That the Act was intended to confer on incorporated towns and villages the power therein granted to police juries, and not to confer upon the juries power to pass ordinances affecting towns and villages.

7. That the Act is not applicable to incorporated cities, but only to incorporated towns and villages, and as Baton Rouge is a city, it is not covered by the act.

It is unnecessary in this case to consider the regulation of the police jury affecting any other matter than the sale, barter, or exchange of intoxicating liquors on Sunday, and we confine ourselves to that question, pretermitting any other aspect of the regulation or prohibition than that which relates to the sale, barter, or exchange of that kind of beverages. We shall examine the several grounds of the motion in their order.

1. The objection that regulations, such as this, are in conflict with that clause of the constitution of the United States which forbids the States passing laws violating the obligation of contracts, has been often considered, and Cooley says; it has been invariably held that this clause

does not so far remove from State control the rights and properties which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important. It is held that all contracts and all rights are subject to this power, and regulations which affect them may not only be made by the State, but must also be subject to change from time to time, with reference to the general well-being of the community, as circumstances change, or as experience demonstrates the necessity of such changes. Const. Lim. 574.

2. The same author says that the power to make these regulations has been sustained, when the question of conflict with State constitutions, or with general fundamental principles, has been raised. They are regarded as police regulations, established by the legislature, for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances. There is no instance, in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of statutes, whereby the sale of intoxicating liquors is entirely prohibited, and the demolition and destruction even of the building used for that purpose is commanded; and it is only where, in framing such legislation, care has not been taken to observe those principles of protection which surround the persons and dwellings of individuals, securing them against unreasonable searches and seizures, and giving them a right to trial before condemnation, that the courts have felt at liberty to declare that it exceeded the proper province of police regulation. Ibid. 583.

3. This is the rock upon which the prosecution would split, if it really existed.

The constitution of the United States forbids the Congress from making any law respecting an establishment of religion, or prohibiting the free exercise thereof. But this is an inhibition to Congress only, leaving to the State governments the whole power over the subject of religion. There are considerable differences in the various State constitutions on this subject, but the general provision of the most perfect equality before the law of all shades of religious belief, is common to all of them.

It has been frequently said that Christianity is a part of the law of the land, and while in a certain sense and for certain purposes it may be true in those States which adopted and have retained the common law, it must be remembered that system never prevailed, nor had any lodgment in this State, save the brief period between the acquisition of this country by the United States and the Act of 1805, when the crimi-

nal part of that system was in force. Mr. Justice Story said in the Girod will case that, although Christianity is a part of the common law of the State (Pennsylvania), it is only so in this qualified sense, that its divine origin and truth are admitted. Vidal v. Girard, 2 How. 198. And it has been said by another court, that Christianity was never considered a part of the common law; so far as that for a violation of its injunctions, independent of the established laws of man, and without the sanction of any positive act of the Parliament of England, made to enforce those injunctions, any man could be drawn to answer in a common-law court. State v. Chandler, 2 Harr. 555.

Some of the States of the original thirteen had prohibitions of blasphemy, profanity and the like in force, as existing in the common law of England at the time of their separation; and statutes of the most vigorous kind were passed in some of them, indicating with minute precision what should and what should not be done on Sunday, for example, the Blue laws of Connecticut. We have been as yet spared in this State the infliction of similar outcroppings of the spirit of Puritanism, and the same learned author already quoted well says;—the laws against the desecration of the Christian Sabbath, by labour or sports, are not so readily defensible by arguments, the force of which all would admit. It is no hardship to any one to compel him to abstain from public blasphemy or other profanity, and none can complain that his rights of conscience are invaded by this enforced respect to a prevailing religious sentiment. But the Jew, who is forced to respect the first day of the week, when his conscience requires of him the observance of the seventh also, may plausibly urge that the law discriminates against his religion, and by forcing him to keep a second Sabbath in each week, unjustly though indirectly punishes him for his religious belief. Const. Lim. 476.

If therefore the regulation had for its object the enforcement of the observance of the Christian Sabbath, as charged in the third ground of the defendant's motion, it would be open to assault; but it is manifestly a police regulation. Like the prohibition of the sale of intoxicating liquors on election-day, it is a regulation under the police power of the State for the preservation of public order. Blackstone's definition of the police power of the State is, "the due regulation and domestic order of the kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations," 4 Com. 162 and this definition has not been improved by modern writers. An eminent judge has described it as "the power vested in the legislature to make, ordain, and establish all manner of wholesome and

reasonable laws, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same." Shaw C. J. in Com. v. Alger, 7 Cush. 84. And he adds, it is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or to prescribe limits to its exercise.

Herein lies the whole difficulty in this and similar regulations. The distinction between a regulation, made solely in virtue of the police power, and for the preservation of the public order alone, and one made for the observance of a particular day, set apart by the votaries of a particular religion for special religious purposes, is often difficult to explain or define, and must in general be left for determination in each case. The general proposition may be enunciated, that the preservation of the public morals and of public order is peculiarly the subject of legislative supervision, and whether the prohibited act is made a criminal offence, punishable under the general laws, or subject to punishment under municipal by-laws, or parochial ordinances, are questions which the legislature must decide; and Cooley on this point adds the significant caution, that "whatever deference the constitution or the laws may require to be paid in some cases to the conscientious scruples or religious convictions of the majority, the general policy always is to avoid with care any compulsion which infringes the religious scruples of any, however little reason may seem to others to underlie them." Ibid. 478.

4. This ground, that the prohibition is in violation of "the law of the land" has been considered in the discussion of the others. Mr. Webster defined this expression in the Dartmouth College case;—"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." We have endeavored to demonstrate that the regulation in question does not affect any immunity which may not be abridged or even destroyed when the interests of public order require it.

5. The title of the Act is sufficiently comprehensive. It indicates very clearly its whole purpose. No one after reading it could fail to be informed of the object of the legislation, and that is the intent of the constitutional provision upon that subject.

6. This is untenable. The phraseology of the Act—the powers thus conferred shall *extend over* and apply to all incorporated towns and villages—precludes such construction.

7. The claim that incorporated cities are not subject to the Act, but only towns and villages, does not much impress us. Many towns

have the same weakness for assuming a title that imports broad territorial area and large population, that some of their inhabitants have latterly developed to appropriate the grand names of historic personages, but the baptism of a legislative Act neither enlarges their dimensions nor swells their numbers. The use of the borrowed designation may be permitted for the indulgence of a pardonable vanity, but not to protect against the penalty of a violated law.

Judgment affirmed.

No. 905.

E. T. WALTERS VS. DUKE, TAX COLLECTOR.

A State tax collector has the right to appoint deputies.

Where no seizure is made by a tax collector, it is immaterial whether the twenty days personal notice to the delinquent, required by the statute of 1879, is given, or not. The law requires only the fifteen days general public notice by the collector, of the places in the parish where he will be present to collect taxes, to put the taxpayers in default. After that, and only in case he seizes the property of a delinquent, is the latter entitled to twenty days personal notice previous to the seizure.

The police jury of a parish have power to impose a uniform and equal license tax on all persons who pursue any particular business, or profession, and in the exercise of that right, may adopt by ordinance, the same tax on the various callings and pursuits, as that imposed by the Legislature.

The article of the constitution requiring that the title of every act shall express its objects, does not apply to the ordinances of a police jury.

The act of the Legislature of 1879, imposing license taxes, does not violate the constitution.

A retail merchant who carries on business in more than one store must pay a separate license tax on each store; and if he sells liquors, etc., in less quantities than a gallon, but not less than a wine bottle, he must pay an additional license tax as retail liquor dealer.

A license tax is not a tax on property, and hence is not affected by the limitation on the power of a parish to impose taxes on property.

APPEAL from the Parish Court of Catahoula.

J. N. Luce and *Richardson & Boatner* for plaintiff and appellant.

Defendant not represented.

The opinion of the court was delivered by

MARR, J. The police jury of Catahoula parish passed an ordinance, on the 3d March, 1879, providing that: "All parish licenses, for the year 1879, shall be the same as State licenses, except the drug licenses."

On the 14th April, the deputy tax collector gave notice in writing to E. T. Walters, to pay, within fifteen days, his State and parish license taxes: first, "as retail merchant in store No. 1, Front street, Troy;" second, "as retail liquor dealer," and third, "as retail merchant in store

No. 2, Back street, in Troy." The taxes were, in each case, $15 for the State, and $15 for the parish, the whole amounting to $90.

On the 19th April, Walters obtained an injunction, prohibiting the tax collector from collecting these taxes, and from interfering with him in the pursuit of his business and occupation. On hearing, the parish judge dissolved the injunction with ten per cent special damages, and ten per cent for attorney's fees; and Walters appealed.

The petition is mainly an argument against the constitutionality of the license tax. It is also objected that the tax collector had no power to appoint a deputy; and that no estimate was made and published of the parish expenses prior to the levying of the tax. Both these objections are disposed of by the admission, on the trial, "that the notice of fifteen days to tax and license payers was published according to law; also, that the estimate of parish expenses was published for more than thirty days prior to the levying of licenses for 1879, as shown by the ordinance."

We decided at New Orleans, in a case which seems not to have been reported, that the tax collectors had the right to appoint deputies; but that is not material, since the only act done by the deputy in this case seems to have been the giving of notice to Walters personally, requiring him to call at the office of the tax collector, within fifteen days, and to pay his license taxes.

The act of 1877, p. 146, sec. 52, requires the tax collector to give fifteen days notice of the places in his parish at which he will be present for the purpose of collecting, from all persons, the taxes due by them. In default of payment, this section authorized the collector to proceed by seizure after ten days written demand.

The statute of 1879, No. 27, p. 44, sec. 4, requires the tax collector to give twenty days notice to delinquents, at the expiration of which, if the tax or license should not be paid, he shall proceed to seize and to sell after ten days advertisement.

The admission in this case is that the general notice of fifteen days was published according to law. On the publication of this notice, it is the business of the taxpayers to repair to the places designated, and to pay their taxes and licenses. The personal notice of ten days, required by the act of 1877, twenty days now, by the act of 1879, is that which must be given to the delinquent before the collector can seize and sell his property. As there was no seizure, it is wholly immaterial whether the personal notice to Walters was given by the proper officer, or whether the time mentioned in the notice, fifteen days, was sufficient. If the tax collector had seized, on that notice, the taxpayer might have enjoined, since the act of 1879 requires twenty days notice before seizure and ten days advertisement before the sale.

The act of 1879, makes it unlawful for any person to pursue his profession or business, without having paid his license tax; and it requires the attorney representing the State, on written notice given to him by the collector, to enjoin any person from transacting his business until the license tax shall have been paid.

No law requires any written or printed notice to taxpayers individually, except where, after the fifteen days general notice, they are delinquent; and the personal notice is the prerequisite to the seizure and sale by which payment may be enforced. The general public notice of fifteen days suffices to put the taxpayers in default; and it is the prerequisite to the subsequent proceedings, whether by injunction or by seizure and sale.

If anything can be settled by judicial interpretation and decision, it is settled that the legislature and the police juries in the parishes, and municipal corporations, have power under the constitution to tax professions, pursuits and occupations, that is, to impose the license tax. This tax, like all other taxes, must be equal and uniform: that is all persons who pursue any given calling, must pay precisely the same license tax; but all pursuits or professions are not taxed alike. In this case the tax is that imposed on all retail merchants, and on all retail liquor dealers; and it is, therefore, equal and uniform in the sense of the law.

It is objected that the police jury had no power to adopt the license taxes imposed by the act of 1879. We see no reason why the police jury should not impose precisely the same tax as that imposed by the legislature; nor can we imagine any possible objection to the action of the police jury in adopting, by ordinance, the same rates for the several pursuits and callings, as those specified in the act of the legislature, without repeating and reenacting them in the ordinance.

The constitution, art. 116, does, as urged by plaintiff, forbid the General Assembly to adopt any system or code of laws by general reference; but we do not see what application this can have to the action of the police jury in this case. The prohibition is addressed to the General Assembly, not to police juries; and the thing forbidden is the adoption of any system or code of laws. The adoption by the police jury of the license taxes imposed by the act of the legislature violates no article or principle of the constitution; and it is as obligatory as if the act had been incorporated in the ordinance.

It is also objected that the ordinance is violative of the constitution in that it has no title to express its objects; and it is urged that the title of the act of 1879 does not express its objects.

The constitution, article 114, does provide that "every law shall express its object or objects in its title;" but this article relates ex-

clusively to "laws" enacted by the legislature, not to the "ordinances" of police juries or municipal corporations.

The title of the act is, "An act to impose a license tax upon trades, professions and occupations for the benefit of the general fund, and to provide punishment and penalties for violations of the same, and to repeal Act No. 26, of the extra session of 1878, approved April 27, 1878, and known as the "Moffett register law."

We fail to discover anything in the act that is not expressed and indicated in the title; and we do not see that it violates the organic law in any respect. The license tax imposed by this act on retail merchants and on retail liquor dealers is $15. Section 1, paragraphs 2, 10. The phraseology of paragraph ten shows that the retail merchant cannot retail liquors without paying the liquor dealer's tax. It imposes this as an additional tax on "all retail dealers or grocers selling distilled liquors, etc., in less quantity than one gallon, but in no less quantity than an ordinary wine bottle."

Paragraph 24 of section 1, of the act of 1879, p. 43, provides that "every person having more than one shop, store or other establishment, or who shall exercise or follow more than one profession, trade, calling or business, shall pay the tax on each separately."

This is copied literally from paragraph 27, section 1, of the act of 1872, p. 52. Under the dominion of this law, Willis Holmes had paid the license tax as a retail merchant; and he claimed the right to retail drugs and medicines, which he did not compound, without paying the license tax imposed on druggists. Our predecessors decided that he was liable to both taxes. 28 An. 765. In a recent case at New Orleans, we decided that a bank engaged in the usual banking business, and which also made loans on deposits and pledges of jewelry and other valuables, was liable to the license tax imposed on banks in general, and also to that imposed on pawnbrokers.

It is urged by plaintiff that the license tax, when added to the property tax, exceeds the limit of parochial taxation. But constitutions, legislation and jurisprudence have settled the principle that the license tax is not a tax on property. The tax on property, under our law, is a certain percentage on valuation; and the license tax is a sum imposed on the pursuit or profession, irrespective of values. The limitation on the parochial power to tax relates solely to the tax on property; and it has no application whatever to the license tax.

The constitution confers the power to tax professions and occupations; and it imposes no restriction on that power, except the general one, applicable to all taxes, that they must be equal and uniform. The license tax must be imposed alike on all falling within the different classifications, respectively, of professions, etc., taxed. All persons who

pursue the business of retail merchants must pay the same license tax. All retail merchants who choose to have more than one store must pay a separate license tax for each; and all retail merchants who choose to sell liquors, etc., in less quantities than a gallon, but not less than a wine bottle, must pay the additional license tax, as retail dealers, prescribed by the statute. This is strictly in accordance with the law of equality and uniformity, and with the spirit and intent of the constitution.

We find no error in the judgment appealed from; and it is affirmed with costs.

No. 907.

MRS. L. VIRGINIA VICKERS VS. BLOCK, BRITTON & CO. ET AL.

A valid judgment of separation of property in favor of a wife is retroactive, and takes effect from the day the wife filed her demand for a separation.

A judgment of separation of property, which has been duly advertised, may be partly valid, and partly invalid; valid as to that part which decrees a dissolution of the community, and authorizes the wife to resume the administration of her paraphernal effects, and invalid as to that part which decrees an indebtedness of the husband to her.

In order to maintain a suit for separation of property, it is not essential that the husband should be indebted to the wife, or that she should own any property in her own right. A judgment of separation need only decree a dissolution of the community, and the wife's resumption of the administration of her own effects, and the issuance of an execution is not necessary to the perfection of such a judgment.

The title to real estate, (which stands recorded as the property of the husband and a former partner of his) acquired by the wife (who is separated in property,) at a sheriff's sale, is null and void as to creditors of the husband and partner, who seized it before the sheriff's deed to the wife was recorded.

A sale of property by one who is not the owner, conveys no title whatever to the purchaser.

A simulated sale of property is absolutely null and void, and any judgment creditor of the owner may seize and sell the property in the hands of the pretended purchaser.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Parsons*, J.

Wells & Williams, and *Richardson & McEnery* for plaintiff and appellee.

P. H. Toler, *M. J. Liddell*, and *Richardson & Boatner* for defendants and appellants.

The opinion of the court was delivered by

DEBLANC, J. On the 6th of November, 1873, plaintiff sued her husband for a separation of property, the dissolution of the community

then existing between them, and to be authorized to resume the administration of her paraphernal effects.

On the 11th of September, 1874, judgment was rendered in favor of plaintiff, recognizing her as the owner of the silverware and household furniture claimed by her, dissolving the community which existed between her and her husband, and authorizing her to resume the administration of her paraphernal property.

That judgment—if valid—was retroactive as far back as the 6th of November, 1873, the day on which plaintiff filed her demand for separation of property. C. C. 2432 (2406).

After the filing of her demand, Mrs. Vickers purchased three lots of ground, one from Varner, on the 29th of August, 1874, another from Edwards on the 5th of March, 1875, and the third one at a sheriff's sale, on the 4th of April, 1876. The evidence of the two first mentioned sales was recorded as prescribed by law—and the other merely deposited in the clerk's office.

On the 27th of October, 1873, Block, Britton & Co., the defendants in this suit, obtained judgment against Henry F. Vickers—plaintiff's husband—and H. Rush, for two thousand eight hundred and forty nine dollars, with four per cent interest thereon from the 15th of November, 1872, subject to a credit; and—on the 1st of November, 1877, caused a writ of *fieri facias* to issue on said judgment. Under that writ, the sheriff seized and advertised for sale the three lots of ground already referred to, which Mrs. Vickers claims as belonging to her, and the intended sale of which she has enjoined.

Defendants in injunction contend that Mrs. Vickers' judgment against her husband is a nullity, for the reason—as they allege—that it was rendered on insufficient evidence, by consent of the parties, and that it was neither published nor executed.

That judgment—as we have said—recognized Mrs. Vickers as the owner of household furniture and silverware, which have not been seized, and so far as the creditors are concerned, it matters not that they are vaguely described in her own petition and in the decree. They do not claim any right which can be prejudiced by that description.

As to the evidence on which that judgment was rendered, it is that she owned and brought to her husbands's home furniture and silverware valued by her witness at from fifteen to sixteen hundred dollars, and—to that extent—it stands uncontradicted; and that, at or prior to the date of her suit against her husband, she had on deposit, in the Louisiana National Bank of New Orleans, nearly seven thousand dollars, which were withdrawn by her twenty days after the institution of her suit. Neither she nor any witness examined on the trial has satisfactorily established her title to that deposit. She declared that she

had sold property belonging to her, but to whom and for what price, did not tell—that she had inherited the money, and it had been given to her by her relations—her father, mother, sisters and brothers—not one of them was called as a witness, and she could not remember how much she had received from any one of them—nor was it shown when and by whom the deposit was made.

This—however--does not affect the validity of the qualified and restricted judgment which she obtained against her husband, which was duly published, and which—partly at least—was not susceptible of any judicial execution—and, here, we refer to those clauses of the judgment which dissolved the community and authorized Mrs. Vickers to resume the administration of her separate and paraphernal property.

In "Joyce Holmes vs. Barbin," Mr. Justice Spofford said—as the organ of the court: "The wife merely desired to have her right to a separate administration of her paraphernal property recognized, and the community dissolved, on account of the disorder of her husband's affairs. This she obtained, and the record does not authorize us to hold that any writ of execution could have effected more than was effected by the simple judgment duly advertised.

13 A. p.p. 474, 475; ante p. —.

In the dissenting opinion read by Mr. Justice Spencer, in Kirkpatrick vs. Finney & Byrnes, and—in that part of his opinion to which there neither was nor could be any dispute, he said: "In order to maintain her suit for a separation of property and dissolution of the community, it is not essential that the wife should be the owner of separate property, or that the husband should be indebted to her. It is now settled that where his affairs are so disordered and his financial embarrassments so great, as to render any earnings or acquisitions of the wife by her own industry insecure, that she may maintain such suit.

"A wife's judgment may—therefore—be good so far as it operates a separation of property and dissolution of community—and bad so far as it establishes title to specific property or indebtedness on the part of the husband."

30 A. p.p. 225, 226.

Article 2425 (2399) of our Code was copied from the Napoleon Code, and—in his commentaries on the latter—Marcadé said: "Ainsi, alors même qu'il s'agirait d'une femme qui n'a rein apporté en se mariant et à laquelle il n'est rien échu depuis le mariage, l'administration ruineuse du mari n'en devrait pas moins faire prononcer la séparation. Cette femme, en effet, à intérêt à s'assurer la conservation de sa moitié dans ce qui reste encore de la communauté que dissipe le mari. Que s'il n'y a pas de biens communs, elle peut avoir un talent, une industrie, dont le produit, après la séparation, lui donnera des ressources pour elle et

ses enfants, tandis que le mari, tant que dure son administration, peut tout perdre et engloutir. Et quand même enfin cette femme ne serait en état de rien gagner par son travail, ne peut-elle pas dans quelques jours, recevoir des donations ou des successions qu'il lui importe de sauvegarder?" Marcadé, vol. 5, pp. 581, 582.

So far as it decrees a separation of property, and the dissolution of the community heretofore existing between Mrs. Vickers and her husband, and authorizes the former to resume the administration of her paraphernal property, the record fully sustains the validity of the decree of the 11th of September, 1874.

Mrs. Vickers could—after its rendition—buy in her own name and with her own funds. She bought—that is shown by the acts introduced in evidence—three lots of ground. The sale from the sheriff to her, of the 4th of April, 1876, was not recorded, when the property thus sold was seized by the creditors of her husband and of his former partner, whose title to said property was alone of record, and it is clear that—as to said creditors—the sheriff's sale upon which she relies was—in the words of the law—utterly null and void. Rev. Statutes, sec. 3189.

It matters not that the same property was—before the seizure—transferred by Edwards, who had no title to it, to Mrs. Vickers, and that the deed passed between them has been recorded. The sale of a thing belonging to another person is null—C. C. 2452 (2427)—and it cannot be successfully contended that the recording of such an invalid sale can—as regards creditors—protect a valid title *subsequently acquired* and not recorded. Mrs. Vickers herself was convinced of that fact, and did not hesitate to purchase—at the sheriff's sale—the property to which Edwards—his vendor—neither had, nor could transfer a title.

The two other lots were sold to Mrs. Vickers by Edwards and Varner. The sales are assailed by her husband's creditors as being fraudulent and simulated.

Mr. Vickers sold to Edwards, a nephew of his wife, for $1960, on credit, a lot situated in Rayville. He sold him the whole lot, though he owned but one half of it, and it was *his partner's half* in the same, which his wife bought at the sheriff's sale. Mrs. Vickers' nephew sold to Parker, a gardner, employed by a brother-in-law of Mrs. Vickers, for $2501, and on credit, the lot which he had purchased from Mr. Vickers, and with the intention—he said—of raising commercial paper with which to transact his business. Parker had no means, and—as a matter of course—his notes could not be disposed of. He retroceded the lot to Edwards, and—on the very day it was retroceded—Edwards sold it to his aunt—Mrs. Vickers—who paid him with the notes which he had subscribed in favor of Mr. Vickers, as the price of said lot. Those notes—Mrs. Vickers declared—had been bought by her from her sister,

who died at her house. How they passed into her sister's possession, we are not informed.

As to the third lot, Mrs. Vickers alleged—in her petition, and—to obtain her injunction—swore that she had purchased it from one Varner. On the trial, she swore that she had purchased it from Lott Chapman, who was dead at the date of the trial, and who—for several years—had been Mr. Vickers' clerk. Varner testified that he had sold that lot to Iler, and Iler to Vickers—that no deed was passed of the sale from him to Iler, from whom alone he received the price of the sale, and who asked him to make a title to Mr. Vickers. He—thereafter—transferred the lot to Chapman, but the act of transfer to Chapman was returned to him by Mr. Vickers, who asked him to sell to Mrs. Vickers. He did so.

Iler corroborated the declaration of Varner, and—in addition—testified that he had sold the lot to Mr. Vickers, in payment of a debt due him—the amount of which he did not mention—but which he had contracted before his—Mr. Vickers'—marriage. Mr. Vickers—he said—was owing Lott Chapman, but how much? He was not asked and did not tell. It was to that deceased clerk that Mrs. Vickers testified that she had paid the six hundred dollars, which—in the act of sale from Varner to her, he acknowledged to have received from her.

The trails of simulation can never be completely obliterated, and two of the acts on which Mrs. Vickers bases her demand bear the impress of those characteristic trails. They are not supported by a single substantial probability, and—were we to admit that she had the means to buy—we would, nevertheless, be compelled to hold that the deeds from Varner and Edwards to her are but empty forms, which—it is evident—are without even a tinge of reality. As to the sheriff's sale, it was not recorded, and the title to the property adjudicated to Mrs. Vickers, at that sale, still appeared of record as belonging to her husband and his partner, when that property was seized to satisfy a judgment rendered against them.

We are told that, if the property does not belong to Mrs. Vickers, it belongs to Varner, Edwards, or the succession of Chapman, and not to Mr. Vickers. We believe otherwise. But be this as it may, those pretended owners are not before us, nor have they authorized plaintiff to enjoin the execution of the writ issued on the creditors' judgment.

To protect their rights, defendants have had to employ counsel and incur expenses, and they are certainly entitled to a portion of the damages which they claim.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed; and—proceeding to render such judgment as should have been rendered by the lower court,

It is further ordered, adjudged and decreed that plaintiff's injunction is dissolved, the sales from John R. Edwards and George H. Varner to her, passed—the first, on the 5th of March, 1875—the other, on the 29th of August, 1874, declared to be simulated, and the property seized by the sheriff of the parish of Richland subject to the enjoined seizure.

It is further ordered, adjudged and decreed that defendants recover—as damages—from Mrs. L. Virginia Vickers and Geo. M. Moseley, G. A. Maes and I. L. Bois—the sureties on her injunction bond—the sum of two hundred and fifty dollars and the costs in both courts.

No. 916.

W. H. H. MULLIN & PREWITT MCGOWEN vs. B. HART, SHERIFF.

A third possessor of property who has bought it subject to a mortgage containing the pact *de non alienando*, and who has assumed the payment of the mortgage debt as a part of the purchase price, can not enjoin the executory proceedings of the mortgage creditor, on the ground that he had paid, under a special agreement with the creditor, usurious interest to the latter, and hence that all interest was forfeited, which would have applied the payments made on interest account to the principal, and thus extinguished the debt. Nor can such an injunction found on the ground that the excess of interest paid over and above that allowed by law, should have been credited on the principal of the debt, and thus made the sum due less than that claimed in the executory proceedings.

An action for the recovery of usurious interest is prescribed by one year from its payment.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Parsons*, J.

Todd & Brigham for plaintiffs and appellants.

Franklin Garrett and *Newton Hall* for defendants and appellees.

The opinion of the court was delivered by

WHITE, J. Benjamin Hart sold on the 16th January, 1873, certain real estate to one Locke, and took as evidence of the credit price a note of Locke for $2100, payable twelve months after date. Locke subsequently sold the property to Mullin & McGowen, who as part of their purchase price, assumed the payment of the note of Locke, purchased as above stated. On the 31st of July, 1877, Hart, as the holder of the original note of Locke, identified with the act of sale to Locke, which contained the clause *de non alienando*, obtained an order of seizure and sale to enforce the sum remaining due on the note, stated in the pleadings to be $431, with eight per cent per annum interest thereon from 10th October, 1876. Mullin & McGowen, as third possessors of the

property covered by the writ of seizure and sale issued against Locke, enjoined on the grounds—

First—That the parish court from which the writ issued was without jurisdiction *ratione materia.*

Second—That certain credits had not been allowed, which reduced the note about one hundred dollars below the sum claimed.

The parish court perpetuated the injunction; the issue was taken to the district court, where the decree of the parish court was reversed and the injunction dissolved. From this decree the present appeal is prosecuted.

First—The question of the jurisdiction of the parish court has been abandoned by counsel in consequence of the opinions in Newman Bros. vs. Cuney, 30 An. 1201, and in Decker vs. Frankenberger, 30 An. 410.

Second—The sole question then before us is the quantum of credit allowed.

As presented by the briefs of counsel and proof, *although not by the pleadings*, the increase of credit results from a claimed charge of usury. It seems that by agreement between the holder of the note and the third possessors of the mortgaged property, the latter paid twelve per cent interest in consideration of the forbearance of the former. That the payments of the amounts were regularly credited on the note; the interest for the purposes of the credits being computed at eight per cent, although twelve per cent was paid. The contention of plaintiffs is that this payment of four per cent additional entails the forfeiture of all interest, and that the sums paid as such should therefore be credited on the principal, leaving nothing due. That if not so, the sums paid as interest over and above eight per cent should be imputed to the principal, thereby reducing the debt from $431, as claimed, to $346 47. We think the propositions untenable. The contract sought to be enforced is the original sale between the plaintiff and defendant by the proceedings *via executiva*, and there is not even an intimation that such contract was remotely tainted with usury. The usury, if any is shown by the proof, results from a contract other than the one sued on, and not a necessary part of it. Norwood vs. Waddell, 11 L. 493.

Even however were this not the case, it is obvious that the demand of plaintiffs in injunction when analyzed reduces itself to an action for the recovery of usurious interest paid. The executory process issued not against them but against Locke, not to enforce any obligation they may have assumed as between themselves and their vendor, but to compel the execution of the primordial contract between Locke and the defendant in injunction; hence necessarily not against the plaintiffs in injunction, who instead of being defendants are purely actors seeking to frustrate the enforcement of a legal contract by indirectly claiming

as plaintiffs a sum by them illegally paid as usurious interest on a distinct agreement. Under this condition of things the pleaded prescription is applicable. 6 A. 470; 18 A. 712; 24 A. 156; 26 A. 23.

We do not think this a proper case for the allowance of damages for a frivolous appeal, but we consider there was error in not allowing the special damages for counsel fees on the dissolution of the injunction.

It is therefore ordered, adjudged and decreed that the judgment of the district court be so amended as to condemn plaintiffs and their surety, John Jones, to pay *in solido* the sum of forty dollars as counsel fees; and that in all other respects the judgment be affirmed with costs.

No. 813.

R. T. JENNINGS ET AL. VS. H. F. VICKERS ET AL.

An exception, which if maintained, will terminate the suit, ought to be tried and decided *in limine*.

A mortgage is not negotiable, in the sense of the commercial law, although it be given to secure a negotiable instrument, and if it has been extinguished, or for any cause has ceased to be a subsisting obligation, so that it could not be enforced by the mortgagee, then it cannot be enforced by any transferee of his, especially to the prejudice of a third possessor of the property on which the mortgage rests, who has paid the price of the property to the mortgagee, extinguished *pro tanto* the mortgage debt, and obtained from the mortgagee an order on the Recorder of Mortgages to cancel the mortgage.

Where the transferee of a mortgage, which covers three different parcels of ground in the possession of three different persons, forecloses on two of the parcels, which sell for enough to pay his whole debt, and fails to enforce the sales, but by agreement with the possessors of the two parcels allows second sales to be made which do not realize the amount of his debt, he cannot afterwards proceed for the residue of his debt against the possessor of the third parcel of ground covered by the mortgage, who has bought the land in good faith, paid its purchase price, and to that extent, by special agreement with the mortgagee, extinguished the mortgage.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray*, J.

W. W. Farmer and *Richardson & Boatner* for plaintiffs and appellees.

P. H. Toler and *M. J. Liddell* for defendants and appellants.

The opinion of the court on the original hearing was delivered by MANNING, C. J., and on the rehearing by MARR, J.

MANNING, C. J. The transcript in this case is so voluminous, the pleadings so prolix, and the issues sought to be presented so numerous and contradictory, that the patience and industry of the Court has been

severely taxed in its examination. The issues necessary to be decided are few and simple, and can be embraced in a narrow compass.

The plaintiffs—R. T. Jennings, John Chaffe, Brother & Son, and Chaffe & Bell, assignees of Winston Morrison & Co., bankrupts—join in an hypothecary action against several defendants for the enforcement of a conventional mortgage executed by H. F. Vickers in favor of Winston Morrison & Co., of date 1st October, 1872.

No defence was opposed to the action by any of the defendants except Mrs. Mulhern.

The following is an accurate and brief statement of the facts disclosed by the record:

H. F. Vickers, being indebted to Winston Morrison & Co., executed in their favor on 1st October, 1872, a conventional mortgage on his property situated in Richland parish, the debt thus secured being evidenced by three promissory notes for $12,650 each, due respectively 1st of January, 1873, 1874 and 1875, with 8 per cent per annum interest from date, which mortgage was duly registered in the Recorder's office of Richland on the 1st day of October, 1872, the day of its execution, the property now in possession of Mrs Mulhern and sought to be subjected to this mortgage being fully described therein. It appears that there was a verbal agreement between Vickers and Winston Morrison & Co. that in case the former could sell any of the mortgaged property the latter were to receive the purchase price and cancel the mortgage upon the property sold.

On the 5th of July, 1873, W. Morrison & Co., the successors and liquidators of Winston Morrison & Co., pledged to R. T. Jennings, as collateral security, one of the Vickers notes—that due 1st January, 1874. On the 25th of August following they sold to John Chaffe, Brother & Son another of the notes. The third note was surrendered as part of their assets in bankruptcy and was sued on herein by their assignees.

On the 12th of August, 1873, H. F. Vickers sold to P. S. Mulhern the lands upon which this mortgage is now sought to be enforced. Hiram Morrison, of the firm of W. Morrison & Co., was present, received the purchase price, which is credited to Vickers on the note sold to Chaffe, and signed an order directing the Recorder to cancel the mortgage upon the lands sold.

This order, with the deed from Vickers to Mulhern, was presented to the Recorder by Morrison and Mulhern for record. That officer refused to cancel the mortgage as requested, assigning as a reason that he had no authority to do so, unless Mr. Morrison could produce the notes. Since he could not do this, both documents were left with the Recorder by Mulhern and Morrison, the latter promising to send up the notes as soon as he reached New Orleans, on receipt of which the mort-

gage was to be cancelled and the deed recorded, Mulhern stating he would not pay for the deed unless the mortgage was cancelled.

Morrison, on reaching New Orleans, instead of sending up the notes as promised, gave credit upon one of them for the notes received from Mulhern and negotiated it to John Chaffe, Brother & Son, without notice of the transaction above related. The note due 1st January, 1874, having been previously pledged to R. T. Jennings.

Very soon afterwards Mr. Mulhern died, and his wife having qualified as administratrix of his estate, this suit was brought against her. The original mortgage from Vickers affected three several pieces of property; one of which at the institution of the suit was in possession of H. F. Vickers; one of W. W. Farmer; and one of Mrs. Mulhern, who are the three defendants. The suit was filed 11th October, 1875. On 26th of March following, Jennings, with consent of Morrison, sold his note to John Chaffe, who also subsequently purchased that sued upon by Chaffe & Bell, assignees.

The defendant in her answer filed October 26th, 1875, urges as her defence that the mortgage herein sought to be enforced, was in effect cancelled and extinguished by the order of 12th August. That Morrison & Co. were the owners of the notes at that time, and the present holders having acquired subsequent, by and with knowledge of this transaction, are bound thereby. She propounds interrogatories to Chaffe and Jennings to prove this defence. Jennings answers that he held the note prior to the sale to Mulhern (acquired it 5th July), and knew nothing of any agreement with Vickers or Mulhern. Chaffe answers that he acquired the note held by him on 25th August, but without any knowledge of Morrison's promise to have the mortgage cancelled. The defendant thereupon filed an amended answer, and called in warranty H. F. Vickers. On the 17th of September, 1877, she filed an exception, in which she urged the dismissal of the action upon three several grounds, viz: That Farmer, being one of the defendants, could not represent the plaintiff; that the plaintiffs are all really acting in the interest of the defendant Vickers, who is charged with being the owner of the notes, and the sole person interested in prosecuting this suit; and that there is a misjoinder of parties.

The court tried the exception, but did not decide it. It is not easy to see why, since time had been consumed in trying it. The exception was tumbled into the omnium gatherum, yclept the merits—a practice which not infrequently wastes time and labour. An exception, which if maintained, will terminate the suit, ought to be tried and decided *in limine*.

Jennings held his note as collateral, and subsequently sold his interest in it, and the suit upon it, to Chaffe, who at length became the

owner of the interests of the assignees in bankruptcy of W. Morrison & Co., and of the other members of the Chaffe firm. When interrogated specially upon the nature of his purchase of these three several interests, he answers that it was an absolute purchase, and that he was subrogated to all their rights.

There were judgments against H. F. Vickers upon which executions issued, and at the sale one of the plantations was bought by Mr. Farmer, as attorney of the plaintiffs in execution, for $3,700, and another was bought by Vickers' wife for $33,711, and these two bids were sufficient to pay the special mortgage which is now sought to be enforced. The bids were not complied with. The property was not offered a second time at their risk. If these bids had been complied with, the Mulhern property would have been free from mortgage, and Mrs. Mulhern could never have been pursued for any part of the demand now made upon her. The whole debt would have been extinguished.

While matters were in this condition John Chaffe went from New Orleans to the plantation where Vickers and his wife lived, taking his attorney with him. It is insisted by Mrs. Mulhern that the result of that conference was an agreement that Mrs. Vickers should be released from liability for her bid of over $33,000, and that the property should be again exposed for sale, should be bought by Chaffe, and then should be resold to Mrs. Vickers (who is separate in property) for a price agreed on. A resale was had in the same year, when the plantation which had been adjudicated at $3,700 on the previous sale, was now bought by John Chaffe for $4,400, and that which had been adjudicated at $33,700 was now bought by the same purchaser for $4,000. The place bought by Mr. Chaffe's lawyer at the first sale brought an advance of seven hundred dollars, and the place bought by Mrs. Vickers at the first public auction suffered a diminution of $29,700, and this in a few months. In the next month after this purchase by Chaffe, he sold to Mrs. Vickers the place she had bought at the first sale, for $14,572.28.

Chaffe could have held Mrs. Vickers to her bid of thirty three thousand dollars, and that, with the bid for the other place, paid the mortgage debt. Both his and Mrs. Vickers' conduct afterwards shew there was an agreement by which she was released by Chaffe from paying her bid, and the arrangement was then entered into, under which the second sheriff's sale was had, the purchase was made by Chaffe at a price so low as to leave a large margin to cover the Mulhern plantation, and immediately afterwards, before the new year's planting operations began, he sold to Mrs. Vickers for an advance over his own bid of ten thousand five hundred and seventy two dollars. He was entirely at liberty to remit to Mrs. Vickers any debt she owed him. If he thought it more prudent as a business man not to pursue Mrs. Vickers for the sum she

had become apparently liable for, and instead, to agree privately with her on a solution of the complication, such as that subsequently carried out, he had the unquestionable right to do with his own as he willed.

But he cannot do this to Mrs. Mulhern's injury. He cannot at his own option change the victim to be sacrificed, and loosing the bands which bound the one, avert the knife from a prostrate Isaac, and plunge it instead into the heart of the lamb which he has dragged from the thicket of mortgages in which it was entangled. Mrs. Mulhern has been released by his release of Mrs. Vickers.

The lower court held otherwise.

It is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that the defendant Mrs. Mulhern have judgment against the plaintiffs on their demand and for the costs of appeal, and her costs in the lower court.

On Application for Rehearing.

Marr, J. The mortgagor, Vickers, with the consent of the mortgagees, Winston Morrison & Co., sold to Mulhern part of the land mortgaged. The mortgagees received the entire price; and they gave an order, in writing, to the recorder, to cancel the mortgage so far as it bore upon this part of the land. This was not done because the mortgage notes were not presented to the recorder. The mortgagees promised to send the notes to the recorder, but failed to do so. They credited the price paid by Mulhern on one of the Vickers' mortgage notes, which they afterwards endorsed specially and delivered to Chaffe, Brother & Son in part payment of a debt.

The recorder retained the order to cancel from the day of its date, 12th August, 1873; and he finally recorded it, in the book of mortgages, under date 4th September, 1875, and made a pencil memorandum in the margin of the record of the Vickers' mortgage, referring to the book and page of the record of the order to cancel.

There were three mortgage notes given by Vickers, to the order of Winston Morrison & Co., each for $12,650, payable, respectively, May 1, 1873, 1874, 1875. In July, 1873, the note maturing 1st May, 1874, was delivered to R. T. Jennings, endorsed by the payees and by W. Morrison & Co., their successors, with other notes, as collateral for a debt of $8400, which they owed him. The note payable 1st May, 1875, was the one endorsed to Chaffe, Brother & Son, with the credits on it, and the one payable 1st May, 1873, W. Morrison & Co. retained until it passed to their assignees in bankruptcy, 16th June, 1874.

A mortgage is not negotiable, in the sense of the commercial law;

and whether it be transferred by separate assignment, or merely as accessory to the negotiable note secured by it, the transferee has no greater rights than his transferror had at the date of the transfer. If the mortgage has been extinguished, or for any cause has ceased to be a subsisting obligation, so that it could no longer be enforced by the mortgagee, it cannot be enforced by the transferee. See Schmidt vs. Frey, 8 Rob. 435; Bowman vs. McElroy, 14 An. 587; Doll vs. Rizotti, 20 An. 264.

If this be true with respect to the mortgagor, with how much greater force must the rule apply to the third possessor, who has paid the price of his purchase to the mortgagee, extinguished, *pro tanto*, the mortgage debt, and obtained from the mortgagee an order to cancel the mortgage.

The two notes payable 1st May, 1873, and 1st May, 1875, passed from the possession and ownership of the mortgagees after the order to cancel had been delivered by the mortgagees to the recorder; and the mortgage, with respect to them, was extinguished on the 12th August, 1873, so far as it bore upon the land sold to Mulhern.

The note held by Jennings was specially endorsed to him or his order. Jennings delivered it without endorsement to Chaffe, long after its maturity, and during the pendency of this suit. Chaffe did not acquire it, therefore, in the usual course of business, before maturity, without notice. When Jennings, with the consent of Morrison, sold the note to Chaffe, or rather, his interest in the suit then pending on the note, the extent of his right and interest was fixed at $4200, the price paid him by Chaffe; and Chaffe had no right to enforce the mortgage as against the land sold to Mulhern, except to the extent of the $4200; and interest from the 23d March, 1876, the date of the payment by him to Jennings, upon the hypothesis that he succeeded to all the rights of Jennings.

But the property mortgaged to secure all the notes, which was not sold to Mulhern, had been sold, at the second sale by the sheriff, part to Farmer for $4000, and the remainder, nominally to Chaffe, but in reality to Mrs. Vickers, for $14,572, making in all $18,572, to be applied to each of the three notes owned by Chaffe. There were large credits on the notes which matured in May, 1873, and May, 1875. But applying the total proceeds to the three notes equally, the portion to each would be $6190, which extinguished the amount due Chaffe on the note which he acquired from Jennings, the only one of the three which could have been enforced against the property sold to Mulhern, under the most favorable hypothesis for Chaffe.

The rehearing is therefore refused.

No. 951.

W. C. WILLIAMSON VS. T. P. RICHARDSON, SHERIFF, ET AL.

A decree dissolving an injunction, on the ground that it was not accompanied by the bond required by law, cannot be pleaded as *res adjudicata* in a second injunction issued with bond by the same plaintiff, for the same causes of action.

The service of the notice of seizure and sale by a deputy sheriff who is a minor, cannot be availed of by the defendant in an executory proceeding as a ground for enjoining the proceeding. That would be to allow, in effect, the validity of the appointment of a ministerial officer to be attacked collaterally, which is not permissible.

A writ of seizure and sale, although issued nominally only against the mortgaged premises, includes, without any particular specification of them, all things on those premises which are immovable, either by nature, or by destination.

It is not necessary for the sheriff to advertise and sell mortgaged property, seized under executory proceeding, in lots or tracts of not less than ten, nor more than fifty acres. Such property is properly advertised and sold in block.

The crop growing on mortgaged premises is a part of the realty, and the owner of the premises, when they and the crop are seized under a writ of seizure and sale, has no standing to set up a privilege on the crop, alleged to exist in favor of a third person.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons*, J.

Cobb & Gunby for plaintiff and appellant.

R. W. & R. Richardson and *Richardson & Boatner* for defendants and appellees.

The opinion of the court was delivered by

WHITE, J. The executors of J. P. Crosley having obtained an order of seizure and sale, the plaintiff enjoined on substantially the following grounds:

1. That the notice of the order of seizure and sale, which by law must precede the writ and be served before its issuance, was served upon him by a deputy sheriff who was a minor. Hence the writ now in the sheriff's hands is illegal, and cannot be executed.

2. That the stock, crop, farming implements, etc., seized, are not covered by the writ, or nominally included in the mortgage; hence their seizure is illegal.

3. That the sheriff has advertised and intends to sell the land, without having caused it to be surveyed into tracts of not less than ten nor more than fifty acres, and that such a sale would be illegal. That the act of 1877, repealing the act of 1870, which latter provided the means or mode of executing article —— of the constitution, is itself unconstitutional, null and void, and hence is not to be regarded.

4. That the farm-hands or laborers had an interest of one-half in the growing crop, and that it could not be seized for his debts.

The defendants pleaded *res adjudicata*, and reserving their excep-

tion, answered by a general denial, and prayed the dissolution of the injunction with twenty per cent general and ten per cent special damages. The lower court dissolved the injunction with ten per cent special damages. Plaintiff in injunction appeals.

1st. The plea of *res judicata* is not well taken. It is founded on the decree in the case of Williamson vs. Richardson, sheriff, 30 A. 1163, decided by us at our last term here. In the case relied on the present plaintiff enjoined the present writ on the first ground above stated and others, and the further ground of prescription. We held that the plea of prescription was not good, and that the other grounds could not be urged in a petition without bond, and dissolved the injunction. Thereupon the present injunction was taken with bond. We will consider the grounds of injunction *seriatim:*

First—The proof establishes that the deputy sheriff who served the notice was a minor. Whilst such fact would have furnished a very good reason for his non-appointment, or a good cause for removal, we are at a loss to understand of what avail it is to plaintiff. The law provides that every sheriff may, *with the approbation of the court*, appoint as many deputies as he sees proper, and before entering on the discharge of their duties they must be sworn by the judge. C. P. 764. There is no pretense that the deputy who served the papers had not been so appointed and qualified, and therefore, although he might have been liable to removal, plaintiff was utterly without right or without interest to collaterally attack the validity of the appointment of a purely ministerial officer. We have recently had occasion to pass upon an objection of this nature, which went to the qualification of the sheriff, and our conclusion was that to recognize the right of litigants to question collaterally the title of ministerial officers *de facto* exercising the duties incumbent upon them by law, would make the administration of justice a mockery, by enabling a defendant to try the sheriff, the clerk, and every other ministerial officer before he himself was tried or his obligations enforced. Our conclusions then expressed have undergone no modification from applying them to the facts of this case. State vs. ———; Thos. S. Elder vs. City of New Orleans, *ante* p. 500.

Second—Although the writ only issued against the mortgaged premises, it necessarily issued against the immovables by nature or destination, which were a part of those premises. There is no pretense that the things seized and not described *eo nomine* in the writ and act of mortgage were not such immovables. The complaint is that they were not ordered to be levied on by the writ, and that the sheriff, a ministerial officer, had no authority to decide as to whether or not particular things were or not immovables by destination or by nature. The fallacy consists in taking for granted that the order did not cover

the immovables by destination. The order to seize and sell the mortgaged property was an order to seize and sell all of it—not a part but the whole—and the sheriff would have been liable in damages had he failed to do his duty and levy under the writ on those things which by operation of law were a part of that which the writ covered.

Third—We see no reason to modify the views we have already expressed as to the effect of the repeal of the statute of 1870 providing for the division of lands. We adhere to those views.

Fourth—The crop was a part of the realty, and if any person had acquired on it a right equivalent to an anticipatory mobilization, such person might be heard to assert such right if any. But the defendant in execution has assuredly no standing in judgment to that end.

We think the damages below allowed are adequate. The judgment is affirmed with costs.

No. 933.

YALE & BOWLING VS. JOHN T. COLE.

The law requires that an attachment bond should be for a sum one half more than the amount claimed by the plaintiff.

Where the bond given by a plaintiff in attachment is for a sum as much as fifty seven dollars less than the amount required by law, he can not invoke the rule *de minimis*, and his attachment must be set aside.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons*, J.

Richardson & McEnery, for plaintiffs and appellants.

Cobb & Gunby for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. This suit commenced by attachment. The sum claimed is $3,287.07 with eight per centum interest on eight hundred dollars thereof from June 15, 1878, and on the residue thereof from December 1, 1878. The attachment was ordered to issue on the plaintiffs giving bond in the sum, and conditioned, as the law directs. Bond was given in the sum of five thousand dollars.

The defendant moved to set aside the attachment on the ground, that there was no sufficient bond executed by plaintiff before the issuing of the writ as required by law. The amount of the bond lacks fifty seven dollars of exceeding the sum claimed and one half more.

If art. 245 of the Code of Practice now requires, as it did formerly, that the amount of an attachment bond must exceed that which is claimed one half, the bond given in this case is insufficient.

The profession is familiar with the history of this article, yet it is necessary to go over it. The words used are, that the party applying for an attachment must give bond in a sum "exceeding one half that which he claims." The corresponding French text is *de la moitié en sus de la somme par lui demandée.* When a construction of this article first became necessary, resort was had to the French text. Our Codes were written mainly in French, and translated into the English tongue. The English text of the Code of Practice suffered by a bad translation, which made reference to the French text specially useful and often necessary. Said the court in Williams v. Barrow, 3 Louisiana, 57—the "article now under consideration is very obscure. A sum exceeding one half of the sum claimed cannot perhaps in fairness be understood to be only one half of that sum," and following a construction already made of the article respecting appeal bonds, which was *verbatim* this one, the court said it meant *the sum claimed and one half more.*

This was adhered to ever afterwards, the court saying in Graham v. Burckhalter, 2 Annual, 415, one of the prerequisites to issuing the writ is that the bond shall be for a sum exceeding by one half that which he claims, and the same language is employed in Planters' Bank v. Byrne, 8 Annual, 687.

When this Code was revised and re-enacted in 1870, the identical language of this article was retained. Its judicial construction had been settled since 1831, and no doubt it was thought that language, the meaning of which was unerringly known, had best be retained, since there could no longer be any dispute about it. Hence the first time this court had occasion to construe it after 1870, it was assumed that the Revisal meant what the original Code meant, and a bond which was for the sum claimed and one half more, minus a deficiency of less than a dollar, was held good under the maxim *de minimis.* Bodet v. Nibourel, 25 Annual, 499, and we have repeated that construction. Miller v. Chandler, 29 Annual, 88.

The plaintiffs ask us to break this regular and unbroken line of decisions, and for no other reason than that the words of the law are precisely the same as before, which we think is the best reason for maintaining the construction that has been given before and since 1870. The argument appears to be, that because several gentlemen of the bar edited the Code of Practice at different times, and had the word "by" printed in brackets in the text, and the compiler of the Revisal in 1870 did not insert that word, *ergo* it was designed that the construction which depends upon that word was intended to be excluded. Whereas we think that the compiler adhered to the exact words that had always been in the Code, because their meaning was certainly known through a judicial construction that had never varied. The Code of Practice, for

some unaccountable reason, was put into the form of an Act in 1870, but we know that legislation, so far as it affects this Code, was merely revisory with very little revision, and it cannot be construed as if it went on the statute book then for the first time. Besides, it is settled and has become axiomatic, that when laws are re-enacted in the same words of the original act, the judicial construction of those words is a part of the re-enactment.

The plaintiffs' counsel treat the subject as if the word "by" had at one time been employed in this article of the Code, and was afterwards left out, when in fact it was never in the text, and what was in the text was construed as meaning "the sum claimed and one half more." The meaning this article has had since 1831 is imparted to it by, and is derived from, judicial construction, and was formulated in the first decision in the phrase above quoted, and not by the use of the preposition, the omission of which is the sole basis of the argument for a change of that construction. The injection or interpolation of "by" was not the cause or the consequence of that construction. The meaning is well expressed without its use, and was expressed in the words, "the sum claimed and one half more." The omission of that word cannot therefore change that construction.

There is no need to interpolate any word. Change the collocation, and it will read "exceeding that which he claims one half." And if changing the collocation be as objectionable as interpolation, both were avoided when the construction of the words actually used was first judicially made.

It is manifest that the plaintiffs understood the article in the sense so long received. If it had been supposed to mean that the bond need be only in excess of one half of the sum claimed, a bond of seventeen hundred dollars would have been a compliance with the requirement. They gave a bond for five thousand dollars, and invoke the rule *de minimis*. Those who invoke process of this kind have been uniformly required to fulfill the minutest requirement. Even if the application of that rule was justifiable when the deficiency of the bond was less than one dollar, such application is not a precedent to be followed in this case.

The lower court sustained the motion, and set aside the attachment, and its judgment is affirmed.

DISSENTING OPINION.

SPENCER, J. Article 245 C. P. of 1870 requires the plaintiff in attachment "to annex to his petition his obligation in favor of the defendant,

for a sum exceeding one half that which he claims." To my mind this language is absolutely free from ambiguity. Grammatical rules make the participle *exceeding* take as *its object* the words *one half.* What is the bond to exceed? "*One half that which he claims!*" No other sense can be given these words, without *interpolation* or *transposition.* Now as I take it, courts have no such authority, where the words used have *a plain and obvious meaning, and do not lead to absurd conclusions.* I think that the experience of every practising attorney will bear me out in saying that there is not one attachment in a thousand where the damages awarded exceed one half of the debt claimed; and that the rule requiring a bond to exceed by half, the debt, is an onerous and unnecessary exaction from litigants.

In 1868 (see acts of that year No. 125) the Legislature re-enacted article 575 of the Code of Practice, relative to appeals, and provided that for suspensive appeal, appellant should give bond "*for a sum exceeding one half the amount for which the judgment was given.*" It will be seen that the language here is identical with that under consideration. By interpolation of the word "by," or by transposing the words *one half* to the end of the sentence, the clause would require a bond one and a half times greater than the debt. In Denton vs. Reading, 23 An. 607, this court had the meaning of these words under consideration, and said: "But under the provisions of the act of September 29, 1868, the bond is required *to exceed one half* the amount of the judgment. We find the law so written, and see no grounds to authorize us to give it a different interpretation." And the court held an appeal bond for one half the amount of the debt good. Had it not been for the French text of the old Code of Practice, I am satisfied no court would have dreamed of interpreting these words, as they were interpreted. But the Code of Practice has been revised and re-enacted. In every edition of the Code of 1825, published after this court interpolated into the English text the word "by," that word was inserted in brackets in article 245. And the fact that in the revisal of 1870 the word was left out, shows that it was intentional. The lawyers (if not the legislators) who did the work of revision, knew that that word should be inserted to conform it to the jurisprudence. It was not done. The omission to do so was manifestly intentional. The case in 29 An. referred to does not decide the question, and what is there said was *obiter.* The bond was in that case nearly double the debt sued for. In many districts of this State the article as it now stands has been uniformly interpreted as meaning *one half of the debt;* and as that interpretation would prejudice *no one,* whilst that now adopted will be ruinous in its effects upon the rights of many litigants in pending suits, we should hesitate long before inflicting this unnecessary injury, more especially when we have to tor-

ture the law, by transposition or interpolation, to bring it into harmony with our conclusions. I cannot bring myself to assent to this result. The words of the law, the reason of the law, the interest of litigants, all forbid me. I therefore dissent from the opinion and decree in this case.

No. 906.

THE STATE VS. W. R. BARROW.

A certified copy of a marriage license from another State of the Union, certified by the clerk of the court, who is also judge of the court, as a copy from the records of his office, and also certified by him, as judge, declaring the attestation to be in due form, and having the seal of the court affixed to it, is in due form, and admissible in evidence.

The proof that certain letters were written by the defendant may be made by a comparison of handwriting.

A verdict of a jury will not be set aside because of ill-timed remarks of the judge, in his charge to the jury, when the remarks contain no error of law, and no comment on the facts.

Where a defendant is tried on a charge of bigamy, the onus of proof is on him to show, as a matter of defence, that his wife had absented herself for the space of five years before his second marriage, and that he had not known she was living within that time; or that he had been divorced by competent authority at the time of his second marriage; or that his former marriage had been declared void by competent authority.

Where an information, charging the crime of bigamy, alleges that the offence was committed more than a year before the filing of the information, but that it had not been made known to any public officer authorized to direct a prosecution, until within one year immediately preceding the filing, the burden of proof will be on the defendant to show that such knowledge was brought to an officer having authority to investigate the crime *before* the said year.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons*, J.

W. N. Potts, District Attorney, *Franklin Garrett* and *Robt. Ray* for the State.

Richardson & McEnery for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant was convicted of bigamy, and was sentenced to pay a fine of five hundred dollars and to be imprisoned in the parish jail two years, from which he appeals. The case comes up on several bills of exception, and a motion in arrest of judgment.

A certified copy of the license for the defendant's first marriage in Alabama, and of its celebration, was received in evidence. It was authenticated by the clerk of the court, as a copy from the records of his office, and this clerk is also the judge of that court. He certifies that fact as well as the copy, and as judge, declared the attestation was

in due form, and affixed the seal of the court. The authentication was complete. Paget v. Curtis, 15 Annual, 451.

The objection that a copy of the record was inadmissible because a copy of the original paper was alone receivable in evidence has been disposed of in Smith v. McWaters, 7 Annual, 145 and West Feliciana R. R. v. Thornton, 12 Annual, 736.

One of the witnesses was asked whether the first wife was then living, and answered that she knew it by common report. It is of no consequence whether she was living at the time of the trial. If she were living at the time of the second marriage, that is the essential matter as to time, and the jury so found. We assume there was evidence to justify it.

The proof of the defendant's letters to his first wife was made by comparison of handwriting. We have only to deal with the mode of proof, and the law justifies it. The sufficiency of the proof was a matter for the jury. One of them bears date subsequent to the second marriage.

The judge's charge is complained of. He spoke to the jury of the sanctity of marriage, of the reprehensible facility with which divorces are obtained in some States, of the disfavor with which our law looks upon the frivolous pretexts that are made the basis of judgments of divorce, and much more of the same tenour. We are inclined to think that much of this might have been omitted without prejudice to the interests of society, but we are not prepared to say that it was such serious error as to call for a reversal of the judgment, and setting aside the verdict. It was not error in law, and was not a comment upon the facts.

The questions presented by the remaining bills are more serious.

The information recites that the commission of the crime was in date more than a year before its filing, and avers that it had not been made known to any public officer having authority to direct an investigation or prosecution until within one year immediately preceding the filing—that the first wife, being alive, had not absented herself from the defendant for five years, and had not been divorced from him, and that the first marriage had not been declared void by the sentence of any court of competent authority.

The prisoner prayed the court to charge the jury that the facts which suspend prescription must be set forth in the information, and that the prosecution must prove them. The charge was refused, the judge saying that it was necessary to allege them, but not necessary to prove them on the trial. He was also asked to charge that the information must on its face negative that prescription had run against it, and that this negation must be proved, and he refused the charge that

such proof was necessary. The further charge was prayed that the prosecution must prove that there had been no divorce—no separation between the spouses for five years—and that the first marriage had not been declared void by a competent court—that neither the information, nor the statutes "set out any excuses" for the defendant to commit the crime, and that he cannot be required to prove that he comes within those "excuses," but that the State must prove that he does not come within any of them—all of which charges were refused.

In our statutes, a crime is usually denounced by name, and we resort to the common law to ascertain what is the legal definition of the crime thus denounced. For example—whoever shall commit the crime of murder shall be punished in such way—and we ascertain from the common law what is murder. The crime of bigamy is not thus treated. The statute reads thus;—If any married person shall marry, the former husband or wife being alive, the one so offending shall, on conviction, pay a fine not exceeding five hundred dollars, and be imprisoned not exceeding two years.

The provisions of this section shall not extend to any person whose husband or wife shall absent himself or herself from the other for the space of five years, the one not knowing the other to be living within that time; nor to any person who shall be at the time of such marriage divorced by competent authority, nor to any person whose former marriage, by sentence of competent authority, shall have been declared void. Rev. Stats. sec. 800.

Lord Mansfield said in Rex v. Javois, 1 East, 643;—it is a known distinction that what comes by way of proviso in a statute must be insisted on, by way of defence, by the party accused; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them.

It must therefore be insisted on, by way of defence, that this party accused comes within one of the provisos of this statute, and he must prove that his wife had absented herself from him for five years, he not knowing that she was alive within that time; or that they had been divorced by competent authority; or that their marriage had been declared void by competent authority. It was so held in State v. Lyons, 3 Annual 154, and in Fleming v. People, 27 N. Y. 329. The rule is thus stated in an approved work;—Where, in a statute, an exception or proviso qualifies the description of the offence, the general rule is that the indictment should negative the exception or proviso. In such cases, when the subject of the exception relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but on the contrary the affirmative must be proved by the defendant as matter of defence. But on the other hand,

if the subject of the averment do not relate personally to the defendant, or be not peculiarly within his knowledge, but either relate personally to the prosecutor, or be peculiarly within his knowledge, or be at least as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative. Wharton Crim. Law, § 614. It is tersely stated by Greenleaf;—but when the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. 1 Evidence § 79.

The contrary was ruled by Wightman J. in Reg. v. Heaton, 3 Foster & Finlason, 819, where he said—the burden of proof, that a person charged with bigamy has not been continually absent from the wife for seven years, and that she was not known to him to be living within that time, is on the prosecution and not on the prisoner, for how can he prove the negative that he did not know. But this was at Nisi Prius, where he alone was presiding, and in Reg. v. Ellis, 1 F. & F. 309, also at Nisi Prius, Willis J. said;—whether evidence is necessary on the part of the prosecution to shew that the prisoner married, knowing his first wife to be alive, depends upon the particular facts of each case. The rule, that the onus of proof in such cases is on the defendant, is better supported by authority, as will be seen by an examination of the decisions fortifying Wharton and Greenleaf *in locis citatis.*

The other question presents more difficulty. The lower court is stated in the bill as ruling that, although the circumstance that suspends prescription, i. e. want of knowledge of the commission of the offence by a public officer having authority to investigate it, must be alleged, yet it need not be proved. If by this is meant that nobody need prove it, the charge is clearly wrong, but we construe it as meaning, that the State is not required to make the proof. Confessedly, more than a year had elapsed from the commission of the offence before the filing of the information, and *prima facie*, prosecution for it was barred. For that reason the averment was made that knowledge of it had not been brought to an officer having the power to prosecute.

Ordinarily, a negative averment has not to be proved, and often cannot be. The negation is not susceptible of proof, other than by proof of the affirmative fact which is denied. The negation here is, that knowledge of the crime was not brought to a public officer of requisite authority. The proof must be of the affirmative fact that such knowledge was thus brought to him. Upon whom is the onus?

It must rest on the party who can most conveniently and most certainly make the proof. Now an affirmative can more certainly, naturally, and logically be proved than a negative. If the onus is on the State, then it must prove that knowledge was not brought to any of

its officers who had authority to investigate the crime. It must prove a universal negative. If the onus is on the defendant, he need only prove that knowledge was brought to one of such officers. He need only prove a particular affirmative.

This is not in conflict with State v. Walters, 16 Annual, 400, nor Morrison's case, 31 Annual, 211. The former held that the State must prove that the offence had been committed within the period fixed by the statute of limitation, which is unquestionably true. The latter held that when a prisoner is indicted for an imprescriptible offence, and is convicted of a prescriptible one, the conviction will not be sustained unless the State shews a previous indictment within the prescriptible time, or cause why such indictment was not found.

The information in the present case expressly alleges that the sole offence charged in it would have been prescribed, but for an absence or omission of a particular fact or circumstance which by law suspended prescription. The defendant must prove that such fact or circumstance existed affirmatively, whereby the prosecution is barred. This proof was not made. Therefore

The judgment of the lower court is affirmed.

No. 822.

H. W. FAIRCHILD VS. H. W. MCENERY ET AL.

The pleas of error of law, of fraud, and of want of consideration, will not avail to defeat the enforcement of a written and honorable obligation, unless they are clearly proved.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons*, J.

Cobb & Gunby for plaintiff and appellee.

F. P. Stubbs for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff sues upon two notes for $1772.32 each, dated September 30, 1874 and payable respectively Dec. 1, 1875 and 1876 with interest from Aug. 1, 1874, signed by the defendants *in solido*, and secured by a mortgage on two-thirds of the Magenta plantation. The defence is, error in the execution of the notes and mortgage; fraud of the plaintiff; want and failure of consideration.

In 1859, J. D. McEnery, the father of the defendants, in his capacity of tutor to them and their sister, acquired an undivided half of the Magenta place. Mrs. Mason, their maternal grandmother, owned the other half, encumbered by a mortgage to secure the payment of one of

the purchase notes. Hanneman held this note, and foreclosed the mortgage, and bought that undivided half of the place through his agent Pritchard, who stipulated with McEnery to convey to him, when he should pay the amount of the Hanneman debt. McEnery had gone into bankruptcy, but before doing so had had recorded a statement of his indebtedness to his minor children, whose mother was dead, prior to January 1870. There were mortgages on Mrs. Mason's part of the plantation that were primed by Hanneman's, amounting to $30,000, so that the arrangement was advantageous in relieving the property from them.

McEnery paid a part of this Hanneman debt, but was unable to complete it, and without completing it, he could not obtain a transfer of the title to himself of that part of Magenta, owned by Hanneman. At this juncture he applied to Fairchild, the plaintiff, to assist him by a loan of the necessary sum for the full payment of the Hanneman debt. The application was made to the plaintiff, not because he was a man of means, which he was not, but because of the long and intimate personal friendship between him and McEnery, and he responded to this call of his life-long friend by putting at his disposal all the money he had, and that not being enough, by borrowing the residue. McEnery executed two notes for the sum thus borrowed from the plaintiff in June 1872, and secured them by special mortgage on the property which he had thus been enabled to acquire from Hanneman. In 1873 he paid a small portion of one of these notes, and shortly afterwards died.

He had contracted a second marriage, and there was one child of that marriage. His widow became the administratrix of her husband's succession, and his sons now of age, the defendants, were her sureties, and managed the plantation. Knowledge of the manner in, and the means by, which their father had been enabled to secure the ownership of the Mason-Hanneman half of Magenta was imparted to the two brothers, and they agreed for themselves and their sister to assume the payment of the plaintiff's debt. At that time the agreement was verbal only, but it was subsequently put in writing viz in July 1874, and after an interval a formal sale was made of the succession property of J. D. McEnery, under order of court, under which the defendants and their sister bought the Magenta place. After the title to this place was thus perfected, and the agreement touching the assumpsit of the Fairchild debt was to be carried out, their sister, who had meanwhile married, and who was expected to bear her portion of that debt, refused to assume anything. The two brothers then assumed the whole.

In September 1874 they executed three notes to Fairchild for his debt, the first of which was for $1500 payable the ensuing December. The notes now in suit are the other two, and were secured by mortgage

on their two thirds of Magenta. They made a payment on the first note in January 1875, and that note is now owned by another person. This suit was filed in November 1877.

The answer is that they owe nothing—that they and their sister were the creditors of their father for a sum far exceeding the value of his estate, by reason of his tutorship, and their mortgage had been preserved by his act in having it recorded—that this mortgage primed Fairchild's, and was entitled to be satisfied to the exclusion of Fairchild's, but they were ignorant of this, or rather they were told by the lawyers of their father's succession that it was not so, and that Fairchild could make his debt—that they looked to these lawyers, who were Messrs. R. W. & R. Richardson, for guidance, and implicitly relied upon their counsel—that R. J. Caldwell, another lawyer and their maternal uncle, was the instrument used by the Richardsons to obtain from them the written agreement of July 1874, which led to the execution of the notes and mortgage—and that the whole was done under error as to their true position and rights, occasioned by the wilfully erroneous information given them by the Messrs. Richardson, whom they charge as being the lawyers of Fairchild, and who were acting in his interest—that their act was produced by the fraud thus practiced upon them, and no consideration existed for the notes.

There is nothing to connect the plaintiff with this scheme for the spoliation of these defendants, except that his lawyers are charged with grave professional malfeasance. The record has naturally attracted our special scrutiny, and we are constrained to say, and are justified in saying, that these imputations are made wantonly, and to all appearance under the sting of self-accusation for having yielded to the gratification of a moral sense at the expense of pecuniary loss. The Messrs. Richardson testify that they distinctly and explicitly informed the defendants—one of whom is said to be a lawyer—of their legal rights, that the plaintiff's mortgage was inferior in rank to their own, and that they could exclude it by enforcing their own. R. W. Richardson repeats many times that he had nothing to do whatever with the Fairchild debt or compromise, and R. Richardson is explicit that he informed B. T. McEnery particularly, and he thinks the other brother also, of the legal status of that debt. The defendants were already apprised of the nature of their father's debt to Fairchild. They knew the fact that Fairchild's money paid the vendor of one half of Magenta. If the titles had shewn the real facts, it would have appeared that Fairchild had satisfied the vendor's lien and ought to have been subrogated to his right. But these friends were thinking more of securing a great benefit to one of them, than observing the formalities necessary to ensure such a security as would prevent harm to the other. What more natural, what more hon-

orable, what more praiseworthy than that the two sons should redeem the promise of their dead father, and by this recognition of the sanctity of his obligation perpetuate his justly honoured name and reputation, and raise up to him, by this deed of honest restitution, a monument as durable as that of which the Roman poet sang.

At the time this promise was made, the Fairchild debt was inconsiderable, compared with the value of the property. The hopes of large returns from investments in planting had not then been extinguished, and in assuming that debt at that time, the defendants were justified in the expectation that the profits of cultivating the plantation would enable them to meet the notes in due time. If the event had crowned their hopes, is it probable that the plaintiff would ever have been driven to this action to enforce his rights?

The experience of every practising lawyer in these late years, when engagements, made while hope was filling every breast, had to be fulfilled under circumstances that were beginning to inspire despair, will furnish a counterpart to this case. Heirs of successions, who willingly promised everything that might be demanded, and who goaded their lawyers by their importunities to conclude advantageous arrangements for them, seek to repudiate their engagements, and make their lawyer the scapegoat, upon whose head are laid all their sins, and whose destruction will expiate their own wrongs.

The judgment of the lower court was in favor of the plaintiff for the amount claimed in his petition, with recognition of his mortgage.

That judgment is correct and is affirmed.

No. 855.

T. C. JOHNSON vs. A. WEINSTOCK.

A furnisher of materials who constructs a building on a lot owned by two coproprietors, under a contract made with one of the coproprietors, which is subsequently recorded, is entitled to a privilege on the entire building for the costs of material and price of workmanship.

A mortgage on real estate executed by one only of the coproprietors of the property can only affect the interest of the mortgagor in the property.

The privilege of the builder and furnisher of materials ranks any mortgage in existence at the time the builder's contract is made, even though he neglects to record his privilege until after the building has been constructed.

A builder who is entitled to a privilege on an entire building, in virtue of a contract made with one only of the owners of the building, has a right to a decree recognizing that privilege, in a suit brought against only that one of the owners with whom he had contracted.

APPEAL from the Tenth Judicial District Court. *Boarman*, J.

Duncan & Moncure and *T. Alexander* for plaintiff and appellee.

Looney & Estner for third opponent, appellant.

The opinion of the court on the original hearing was delivered by SPENCER, J., and on the rehearing by MANNING, C. J.

SPENCER, J. A. Weinstock owned an undivided half interest in lot 8, square 59 of Shreveport. His minor children owned the other undivided half.

On 27th June, 1873, there was an act passed between him and S. Cohen, in which it was declared in substance, that they had agreed as follows:

First—That Weinstock was to build on said lot a double two story brick store, giving its dimensions. That to assist in said building Cohen agreed to loan and advance to said Weinstock, at stated times, at stated installments, $9000; that if Cohen failed to deliver said installments within ten days after their maturities, he is to pay Weinstock certain damages; that said building shall be completed by 1st October, 1873; that in consideration of said loan, and in lieu of interest thereon, said Weinstock agrees and binds himself to lease and hereby leases to said Cohen for four years, from the completion of said building, one of the said double stores and certain other rooms—said Cohen reserving the right to sublet it; that Cohen shall be put into possession 1st October, 1873, and if not Weinstock shall pay him $125 per month until he is put into possession. That on the expiration of the loan Weinstock is to repay the $9000, and Cohen to retain possession till repaid. That in the event said building should during the lease be destroyed, said loan shall be immediately payable; provided Weinstock may within six months rebuild, but shall during that delay pay Cohen $125 per month. If he should not rebuild Cohen is to have $125 per month until the $9000 is fully repaid to him.

That "in order to secure the prompt fulfilment of all the obligations by him herein assumed," Weinstock "specially mortgages to Cohen, said lot No. 8, together with all the buildings and improvements thereon he may hereafter erect."

This act was duly recorded same day in the mortgage office.

Weinstock at once employed the plaintiff to furnish the material and construct said building, but no written contract was entered into. In January, 1874, after the completion of the building, Johnson took Weinstock's two notes for the balance due him (some $1862 25) stating therein the consideration. On 17th August, 1874, these notes were duly recorded in the mortgage office. In June, 1875, Johnson obtained judgment against Weinstock on said notes, with recognition of his "privilege, as builder and furnisher of materials, on lot 8, square 59, and also on the buildings and improvements thereon."

Execution having issued on this judgment, the sheriff seized "the undivided half interest of Weinstock in and to lot 8, in square 59, together with *all of the buildings* on *the whole* of said lot," etc.

The lot and building were separately appraised, the former (one-half interest) at $4000, and the whole building at $10,000. The property was adjudicated at two-thirds of appraisement to M. Cohen at $9333 33⅓ in cash. M. Cohen claims to be holder as heir of the rights of S. Cohen, and we shall so treat him. Previous to this sale said M. Cohen filed this third opposition, claiming to be paid by preference the amount of a special mortgage to Swanson, held by him for $1612 50 and interest; also $9000, the amount of the mortgage given to S. Cohen. That opposition is now before us. This case was before us last term, and was remanded, to enable Cohen to show that the $9000 had been furnished under that agreement. We think the proof now shows that fact. Cohen's claim of preference, under this $9000 mortgage, is resisted chiefly on two grounds.

First—That M. Cohen was not a third person, but a privy, in the contract for building said house.

Second—That he had and could have no mortgage beyond the undivided half interest of Weinstock in the house and lot.

The judge *a quo* gave plaintiff preference over Cohen, on (we are told) the first ground. Cohen appeals.

It will be seen that the building was appraised at $10,000, and sold at two-thirds thereof, i. e. $6666 66⅔. So that if Cohen's mortgage only operated on a half interest, there would be $3333 33, proceeds of the building, unaffected and ample to pay plaintiff's privilege thereon.

Whilst we are not prepared to dissent from the views of the judge *a quo* on the first ground, we prefer to rest our concurrence in his decree on the second.

By the Roman law, one who made constructions on soil which he knew to belong to another, was presumed to be willing to lose his materials, and had no claim against the owner of the ground, who acquired an absolute right to whatever was erected on it. D. 41 L, 1 T. 71, § 12; Baldwin vs. Insurance Co., 2 R. 133.

By our law this absolute right has been qualified, as follows: If the person who makes the constructions knows he has no right to do so, in other words, *is in bad faith*, then the owner of the soil is not owner of the constructions, unless he elects to take them. He may require their demolition or removal. But if he elect to keep them, they *become his*, and he owes the constructor the costs of material and the price of workmanship.

But if the constructor have built them *in good faith*, i. e. believing himself owner, or to have the right to do so, the owner of the soil built

upon has no right of election. He cannot refuse to keep the buildings. They are his, as part of the soil; but he is bound to reimburse the builder in one of two ways, of which he has choice, i. e., either by paying him the costs of material and price of workmanship, or by paying "a sum equal to the enhanced value of the soil." C. C. art. 508.

The builder *in good faith* is thus made as it were the *negotiorum gestor* of the owner of the soil, and the works constructed by him are considered as made for and on his (the owner's) account and brings into operation the rule of article 505 C. C., whereby it is declared that "the ownership of the soil carries with it the ownership of all that is directly above and under it."

We think that one joint owner of land *has a right to build upon and improve* the common property; and must be considered therefore as building *in good faith*, and as the *negotiorum gestor* of his coproprietor, who thereby becomes obligated to reimburse and pay to the coproprietor who makes the improvements either the costs of materials and price of workmanship, or the enhanced value of the soil. The right of electing between these two modes of compensation protects the coproprietor from ill-advised and unnecessary improvements made by one of them. If the buildings, etc., constructed have cost more than they are worth, the coproprietor elects to pay only his part of the enhancement in value, received by the soil therefrom.

But as we have seen, where buildings have been constructed *in good faith*, they belong in every event to the owner of the soil. He cannot relinquish or refuse to take them. Nor can the other party take them away. The only right the party building has, is a personal, movable action against the owner for compensation and reimbursement. Under the operation of these principles it is therefore manifest that Weinstock only owned an undivided half of the house and of the lot; and that he also owned a right of action against his coproprietors for a sum of money in reimbursement of amounts expended by him as their *negotiorum gestor*. This right of action, this *chose in action*, was an incorporeal movable, not susceptible of mortgage, and not embraced in Cohen's mortgage.

But the plaintiff's privilege did operate upon the entire building. His judgment recognized this privilege and ordered the sale of the entire building, which could be, and was, sold separately and as an entity, under *his* claim, regardless of the ownership or alienability of the soil. See Howard McKnight vs. the Parish of Grant. 30 An. 361.

There is no force in the position taken by Cohen, that Johnson had acquiesced in the original (first) judgment in his (Cohen's) favor; which judgment was appealed from by Johnson, and reversed and annulled by this court, at its last term, without Cohen interposing such acquies-

cence as a bar to the appeal. If it ever existed he abandoned it. But we do not think it ever existed. To have allowed it, would have been to permit him to take advantage of his own wrong.

The decree of the court *a qua*, of 22d December, 1877, appealed from, does substantial justice; it is affirmed at costs of third opponent in both courts.

ON REHEARING.

MANNING, C. J. Cohen's mortgage, being a convention, could affect only the property of his mortgagor. The undivided half of the property which belonged to Mrs. Weinstock's children was unaffected by it.

Johnson's claim was personal against Weinstock, and also against the building. His privilege sprung out of the law, and as it affected the building, not in consequence of the contract between himself and Weinstock, but because he was author of the structure, it did not need the assent of the children to make it operative.

We are urged in the argument for rehearing not to lose sight of the pleadings, and to hold Johnson to them. He sued Weinstock alone, and took judgment only against him. He could sue no one else, but he claimed a privilege upon the whole building, and the judgment recognized it. The suit, as a personal demand, was against Weinstock alone —as a demand of privilege, created by law and inhering upon the thing, it was against the building. It was defendant *quoad* that part of the claim. It is also urged that as the children were not parties to Johnson's suit, his judgment did not affect their part of the property. After the acquisition of their part of the property by Cohen, he stood in their stead, and he was and is a party to Johnson's suit as third opponent.

Cohen recorded his mortgage, and it took effect then upon Weinstock's half of the property. Johnson failed to record his privilege when he should, to secure entire safety, but no new liens were created, and his was recorded in time as against Cohen. Cohen found, after his money had been loaned and all paid over, that the children's rights were in his way, and he was forced to acquire them. Johnson's privilege was then on record. It must prevail over Cohen's mortgage. It is higher in rank—different in origin—and broader in expanse, since it covers the property of those whose assent was not given to its creation.

Cohen was careless, and neglected to ascertain the condition of the title to the property. He suffers for his fault. We are told he made a hard bargain. "Served him right," is the approbatory exclamation of Johnson in resisting a change of judgment. It is said Cohen extorted large compensation for the use of his money after what is commonly

supposed to be the traditional usage of his race. Very likely the Jew taught the lesson, but never did master have apter pupil than he found in the Gentile. By us, who sit in judgment on both, their acts must be measured by the standard of the law alone, and a patient and renewed examination of their claims satisfies us that justice has been meted to both.

It is therefore ordered that our former decree remain undisturbed.

No. 940.

SUCCESSION OF B. H. DINKGRAVE.

Where an account, acknowledged by the administrator in a writing without date, is declared on in an opposition as an acknowledged account, and annexed as part of the opposition, and offered in evidence without objection on the part of the administrator, he cannot, after having filed an answer to the opposition without denying his signature to the acknowledgment of the account, set up that his signature was not proved by the opposer.

Where the acknowledgment of a succession debt by the administrator has no date, but it appears from the face of the record that it was made subsequent to an affidavit to the debt, which has a date, and that the debt would not be barred by prescription even if the acknowledgment had been made at the date of the affidavit, the plea of prescription will not prevail against it.

Where a debt against a succession, duly sworn to, is offered in evidence without objection by the administrator, it will be held to be *prima facie* proven.

The *prima facie* proof of an account, carries with it that of an item of credit on the account, without which the account would be prescribed.

A payment on an account is imputable to the oldest items on the account.

Where a payment on an account is made at a certain date, and judicial demand follows nearly two years thereafter, all the items on the account prescriptible in one year, will be barred.

Where the debt of the deceased as a surety has been placed by his administrator on the latter's tableau, the succession will be liable for the debt, unless some fact is affirmatively shown that would discharge or release it.

Where a surety who is called on to pay the debt of the principal compromises and settles the debt for a sum much less than the amount of the debt, (as for example where he pays the debt in depreciated warrants) he is entitled to claim from the principal only the actual amount paid by him. And it will be assumed that he paid only what was shown to be the market value of the warrants used in settling the debt, unless he proves the contrary.

APPEAL from the Parish Court of Ouachita. *Garrett*, J.

J. H. Dinkgrave for the succession, appellant.

Richardson & McEnery, and *Robt. Ray* for opponents, appellees.

The opinion of the court was delivered by

WHITE, J. W. H. Dinkgrave, administrator of this estate, filed on the 3d April, 1878, a final account. He charged himself with $5104 25 and credited himself with $5186 90 mortgage and privilege debts, and

$590 51 of ordinary debts were acknowledged, thus showing the estate to be insolvent. Among the debts stated as privileged was $1000 paid the surviving widow, and $2500 paid the State of Louisiana as a mortgage creditor.

S. Meyers, who was placed on the account as an ordinary creditor, opposed its homologation on the grounds—

1st. That the administrator was legally chargeable with the difference between the total of the inventoried price of the real estate in the first inventory and the amount which it brought at the sale, $4000.

2d. The same difference as to sale of certain warrants, $2000.

3d. That only $500 had been paid the State of Louisiana, hence the administrator should account for $2000.

4th. That the sum reserved to the widow in necessitous circumstances was not due, $1000.

Making a total of increase in favor of the creditors in consequence of an increase in the active and decrease in the passive of $5786.

He prayed the amendment of the account in accordance with the foregoing. Thereafter the following persons, not placed on the account, joining in the opposition of Meyers, claimed to be placed thereon: G. W. McFee for $41 20, debt due by account, with five per cent from 27th August, 1876; D. A. Breard, claiming to be a creditor for $55 30, with five per cent from August 28th, 1878; Frank Terrell, claiming to be a creditor for $118 76; J. S. Sanders, likewise so claiming, for $63, with five per cent from 1st January, 1877.

The administrator filed answers to all the oppositions, denying the existence of the debts. He pleaded various prescriptions against the several opponents. The lower court allowed the claim of McFee in full, as also that of Terrell, and partly allowed the claims of the others. The grounds of opposition urged to the various items were all disallowed, except the objection to the credit claimed from the stated payment of $2500 on a sum due the State; this was reduced to $750. The administrator appeals, and the opponents answer by praying the allowance of their claims in full.

We will first consider each separate opposition, and then pass upon the grounds of complaint common to all the opponents.

1. McFee's claim is on an account of $41 for drugs. The account is detailed, and its correctness sworn to by the claimant, on the 8th of January, 1877, before a deputy recorder, and below the jurat of the recorder is a written acknowledgment of the correctness of the claim, signed by the administrator, but not dated. He now contends that the account should not have been allowed, because not proved, and because prescribed. The debt, although not otherwise proven, was sued on as an acknowledged account, and contains on it the written recognition and

allowance of the administrator. It is urged that the signature of the administrator was not proven, which is a fact. But as we have seen, the claim was stated in the opposition as an acknowledged one, and the account was annexed to the opposition with the acknowledgment on it, and although the administrator took the precaution to file an answer to the opposition, he did not deny his signature to the written acknowledgment, and allowed it to be offered in evidence without objection. We cannot hear him under this state of things complaining of the want of proof of signature. He contends that inasmuch as the acknowledment is undated it can have no other date, without proof, than that of the filing of the opposition to which it was annexed, that is April 4, 1878, at which date the account was prescribed, hence rendering the acknowledgment unavailing, an administrator being without power to renounce prescription. Granting the correctness of the proposition, as a matter of fact, it is not sustained by the record. The account, as we have seen, was sworn to before a deputy recorder on the 8th January, 1877, and *the acknowledgment follows the jurat*, and must have been made after that date—considering that date as fixing the acknowledgment, the prescription had not accrued, and the claim was therefore properly allowed.

2. D. A. Breard. This claim also is by open account. The administrator complains that it was improperly allowed, because not shown to be due, and because prescribed. The account had been duly sworn to on the 8th day of June, 1877, and as thus verified, was offered without objection, and was therefore *prima facie* proven. Of course the *ex parte* affidavit was not binding on the administrator, and would not have been admissible if its offer had been resisted, but when permitted to go in proof without objection, we think made a *prima facie* showing for the opponent. The account contains mention of a credit of $50 paid August 23, 1876, without the interruption resulting from which prescription would have accrued. It is contended that the payment not having been proven, the prescription must be considered as having been vested. But the *prima facie* proof of the account carried with it that of the item of credit. The lower court considered that the payment of fifty dollars was imputable to the oldest items in the account, and so ordered, thus extinguishing all the items therein up to March 31st, 1876. It also considered that as the payment was made on the 23d August, 1876, and the judicial demand against the estate on the 8th April, 1878, all items in the account prescriptible in one year under C. C. 3534 were barred. Under this ruling it deducted from the account items amounting to $6 35. We think the finding both as to law and fact entirely correct, and although the administrator urges by brief that other items charged in the account are covered by the terms of C. C. 3534, we do not so consider.

3. The claim of Meyers is upon an account for $84 42 and a note for $105—subject to a credit of $25: $80 and $84 42=$164 42. The lower court declared the note barred by prescription, and struck from the account two items, one for merchandise, Eaton Logwood, $16 75; the other to the same effect for $10. These items were stricken from the account, because the merchandise covered by them was sold to Eaton Logwood on the security of the deceased, and because no effort had been made to collect from Logwood, hence the surety was discharged. We find no proof to this effect in the record, and as the account was placed on the administrator's tableau, and thus acknowledged by him, we think there was error in striking off the items. The note was evidently prescribed, maturing in April, 1869, when the tableau of the administrator was filed on the 3d April, 1878, the period of prescription had been accomplished. The account having been stated by the administrator in his list of ordinary debts, did not *quoad* the administrator require other proof?

4. The administrator does not complain of the allowance of the sums due Sanders & Terrell, and if he did, they are indubitably established.

Thus disposing of the claims of the various opponents, we will examine the objections to the credits, claimed by the administrator and objected to by the opponents, then the debts which it is contended should be increased.

1st. The credit as to the $2500 mortgage debt due the State results from the following facts: The deceased was a tax collector, and as such owed the State say $3200, mostly for the revenues of 1876. The surety on his bond made an arrangement in 1877 with the Auditor of Public Accounts, by which the indebtedness was compromised or agreed to be compromised on the payment into the State treasury of twenty-five hundred dollars in valid State warrants. This having been done, on the 14th February, 1878, the Auditor of Public Accounts, issued a *quietus*, in which he recited that, "whereas, B. H. Dinkgrave (through Jno. T. Ludeling for sureties) * * * has exhibited * * * the receipts of the Treasurer in full for the payment of the State taxes for the year 1874, $2500, compromise settlement, I therefore issue this *quietus*." * * The Auditor, whose testimony is in the record, says that the payment was made in "valid State warrants." The opponents contend that, as such warrants were only worth twenty cents on the dollar at the date of the settlement, the estate is fairly chargeable only with the value of the warrants, that is $500, instead of their face value, $2500, charged in the account. The lower court sustained the proposition, and as a matter of fact found the warrants were worth at the time of the settlement thirty cents on the dollar, and allowing for them at that rate reduced

the credit from $2500 to $750. We think it correctly applied the law and facts. The contract of suretyship is essentially a beneficent one, and whilst the surety who paid was legally subrogated, he was so only to the extent of his actual and necessary payment. If he made an advantageous settlement the benefit of such payment was as much the principal's as his own. Indemnification and not profit is the measure of the surety's recourse against the principal, as taught by our law and the jurisprudence thereunder. C. C. 3052; 7 N. S. 9; 5 R. 506; 3 A. 627. In fact such was the rule under the Roman law, whence the law of suretyship as existing in our Code has been in a large measure drawn. "*Sciendum est non in plus fidejussorem consequi debere mandati judicio quam quod solveret.*" Pand. t. 26, sec. 4, D. Mandati. The like principle is applied under the Napoleon Code, whose text on the subject is like our own, for, as said by Troplong, "suretyship is entered into as a means of service, not as an instrument of profit." Troplong du Cautionnment, No. 342, p. 302. It is said that as the certificate of the Auditor did not disclose the payment to have been made in warrants, the administrator was justified on its presentation in paying the full amount to the surety. The record does not disclose the payment, and if it did, the result would be unchanged, for if the administrator paid without filing an account, he is in no better position than the surety would be. It is urged that the surety may have been the owner of the warrants—may have acquired them before the settlement, at a time or under circumstances making them as to him represent their face value. Grant that under such circumstances the market value would be no criterion or standard by which to measure the surety's subrogation, there is no proof whatever to that end. The burden was on the surety, Pickett vs. Bates, 3 An. 628, more especially where the payment in warrants and the market value thereof was shown by the opponents. The value of the warrants as fixed by the lower court is sustained by the proof. The other items of opposition were rejected by the court below, and we think correctly so; and as the effect of the reduction of the credit just referred to is to provide adequate means for the payment of all the opponents, we are dispensed from further examining at length the very satisfactory and careful scrutiny given, the issues presented, by the lower judge.

It is therefore ordered that as to all the oppositions, except that of S. Meyers, the judgment below be affirmed with costs; that as to S. Meyers the judgment be amended by increasing the sum allowed by $26 75; the costs of both courts to be borne by the succession.